

**DECISION & AWARD**

In the Matter of Arbitration	)	
	)	
Between	)	
	)	
National Weather Service, National Oceanic and Atmospheric Administra- tion, Department of Commerce (Agency/NWS)	)	FMCS Case No. 170914-54764 (Termination of CBA)
	)	
-and the-	)	
	)	
National Weather Service Employees Organization (Union/NWSEO)	)	

Before: Laurence M. Evans  
Arbitrator

Appearances:

For NWS: Allison K. Zeigler, Esq. (Hearing only)  
Adam Chandler, Esq. (Hearing only)  
John K. Guenther, Esq. (On Brief)  
Washington, DC

For NWSEO: Richard J. Hirn, Esq.  
Washington, DC

**I. Statement of the Case**

On October 25, 2001, the parties entered into a collective bargaining agreement (CBA) under the Federal Service Labor-Management Relations Statute (Statute). On July 21, 2017, the Agency, in writing, informed the Union that, effective immediately, it was terminating the parties’ 2001 CBA pursuant to Article 29, §3 of that agreement (“Duration and Terms of Agreement”). Article 29, §3 provides:

This Agreement will remain in effect for 90 calendar days from the start of formal renegotiation or amendment of said Agreement, exclusive of any time necessary for FMCS or FSIP proceedings. If at the end of the 90-calendar day period an agreement has not been reached and the services of neither FMCS or FSIP have not been invoked, either party, may, upon written notification to the other, terminate any or all sections of the Agreement.

In its July 21, 2017, termination notice to the Union, the Agency further advised that:

CBA terms continue as past practices and remain in effect until there is a new agreement. Until that occurs, NWS will maintain the status quo, operating under the procedures and policies established under the 2001 CBA. If NWS determines there are exceptions to the requirement that we maintain the status quo for those provisions in the 2001 CBA, MOU, past practices, and agreements that are either contrary to law or are permissive subjects of bargaining, NWS will give Notice and bargain where required over the ending of those exceptions.<sup>[1]</sup>

The language currently at issue in Article 29, §3 resulted from a June 16, 1986, Decision and Order of the Federal Services Impasses Panel (FSIP) in Case No. 86 FSIP 30. Unable to resolve an impasse over CBA duration during negotiations for their first CBA, the parties sought the services of FSIP. FSIP ordered the parties to adopt the language in Article 19, §3, explaining that:

Having considered the evidence and arguments in this case, we are persuaded that the Employer's proposal, as modified herein, provides a reasonable basis for settlement of the dispute. In this regard, a specific time limitation for the negotiation of a successor agreement should serve as an incentive for both parties to complete negotiations in an expeditious manner, thereby avoiding the excessive costs and delays which the parties experienced during negotiations....If negotiations are nevertheless not completed within the 90-day period, either party may prevent the terms of the contract from expiring by requesting the services of the Panel by the end of the 90<sup>th</sup> day. Thus, the contract would remain in full force and effect until a successor agreement has been finalized....Since the parties may not be at impasse at the conclusion of 90 days of bargaining, however, we would add to the Employer's proposal that a request by either party for assistance from the [FMCS] before the end of the 90-day bargaining period would also serve to prevent the agreement from expiring.

What exactly led up to the Agency's July 2017 termination of the parties' CBA follows. Record evidence shows that in the summer of 2015, the Agency notified the Union that it wanted to renegotiate the parties' CBA. Under Article 29, §2, the next step in the renegotiation process required the parties' to execute an MOU on ground rule policies and procedures. On July 17, 2015, presumably around the time ground rule negotiations commenced, the Union filed Form F-7 with the Federal Mediation and Conciliation Ser-

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<sup>1</sup> To date, there is no record evidence that the Agency has changed the *status quo* in any respect.

vice (FMCS) seeking FMCS assistance. The Union's President/Chief Negotiator (Daniel Sobien) was also sent a copy of the Union's FMCS filing to the Agency's negotiators, advising, in relevant part, "Attached is my submission of form F-7 to the FMCS and thereby fulfills the union's obligation under Article 29, Section 3 of the parties' CBA."<sup>2</sup>

After it received the Union's form F-7, FMCS assigned Mediator Gilbert Scudery of its Miami office to assist the parties. Scudery worked with the parties on the question of how many negotiators each side would have but got nowhere. At that point, the Agency requested the assistance of the Federal Service Impasses Panel (FSIP). On September 23, 2015, in Case No. 15 FSIP 118, the parties settled their ground rules dispute over official time and travel.

The parties renewed face-to-face ground rules negotiations in November 2015 in St. Petersburg, Florida. FMCS Mediator Scudery again participated in these negotiations. After making some progress, negotiations fell apart.<sup>3</sup> At this point the Agency decided the parties were at impasse and again requested FSIP assistance.<sup>4</sup> On February 9, 2016, in Case No. 16 FSIP 27, the FSIP denied the Agency's request for assistance with the parties' ground rule negotiations. FSIP concluded that the parties were not at impasse in their negotiations at this time.

Following the FSIP's declination of jurisdiction, the parties resumed ground rule negotiations in March 2016 in St. Petersburg, Florida and again in May 2016, in College Park, Maryland. In their College Park negotiations, the parties were assisted by FMCS

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<sup>2</sup> The Agency takes the position (below) that this filing was not submitted in "good faith."

<sup>3</sup> As a consequence, the Union filed a ULP with the FLRA on November 24, 2015, alleging that the Agency breached its duty to negotiate in good faith over ground rule negotiations. On June 22, 2016, the FLRA's General Counsel issued a complaint against the Agency in Case No. WA-CA-16-0097. The complaint alleged that the Agency refused to negotiate in good faith. On August 10, 2016, the Agency entered into a settlement agreement with the Agency wherein the Agency agreed to "bargain in good faith with NWSEO...and avoid unnecessary delays in the bargaining process." The Agency also agreed that it would "not unilaterally end bargaining by insisting the parties are at impasse when no impasse has occurred."

<sup>4</sup> It is unclear in the record when exactly the Agency requested FSIP assistance. The Union insisted the parties were not at impasse at this time.

mediator Paul Concorida, whose assistance was requested by the Agency. The parties made substantial progress in coming close to a ground rules agreement.

Nonetheless, still unable to consummate an agreement on ground rules, on June 9, 2016, the Agency filed a Request for Assistance with FSIP. In that request, among other things, the Agency pointed out that on June 1, 2016, “FMCS Commissioner Paul Concorida confirms via separate phone calls with each Chief Negotiator that further mediation would not be fruitful and that the parties need FSIP assistance.”

The FSIP agreed to assist the parties in resolving their remaining ground rule issue.<sup>5</sup> On October 27, 2016, in Case No. 16 FSIP 92, the FSIP directed that the parties participate in mediation/arbitration under the auspices of FSIP Chair Jacksteit. The mediation/arbitration was scheduled for December 7, 2016, at FSIP offices in Washington, DC. During this proceeding, the parties were able to resolve their remaining ground rule dispute and entered into a “Settlement Agreement” resolving Case No. 16 FSIP 92. This agreement, along with the parties’ October 26, 2016, MOU on ground rules, completed the parties’ ground rule negotiations subject only to Agency head review under Section 7114(c) of the Statute.

Following Agency head review, on December 9, 2016, Valerie Smith, Director, Office of Policy and Programs (HR) issued a Memorandum providing that the parties’ ground rules MOU and their December 7<sup>th</sup> settlement agreement “were consistent with Federal law, rule and regulation. Accordingly, I am approving the MOU. The MOU is effective as of the date of this memorandum.”<sup>6</sup>

Substantive negotiations got going in January 2017. At that time, the Agency submitted bargaining proposals to the Union. The Union, in March 2017, responded by

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<sup>5</sup> On October 26, 2017, the parties entered into an MOU “Concerning Ground Rules for Bargaining over a Term [CBA].” Among other provisions, in para. 16 of the MOU, the parties agreed that “Either party may invoke the services of the FMCS at any time....If the parties fail to resolve the matter with the assistance of FMCS, then either party may send the matter to the FSIP.” Apparently, at this time, only one issue remained unresolved.

submitting some of its proposals, pursuant to the schedule established under the ground rules agreement. On April 4, 2017, the parties, for the first time, met face-to-face to discuss substantive proposals exchanged to date.<sup>7</sup>

Concerned that substantive negotiations for a new CBA would not go smoothly, on or about February 27, 2017, Union President Sobien, after speaking with FMCS's Baltimore Regional Director, filed another Form F-7 with FMCS, seeking FMCS assistance with the parties' negotiations. Sobien testified that the parties were assigned Mediator Randy Mayhew to assist them in negotiations. From approximately April 2017 until July 2017, Sobien testified that he stayed in touch with Mayhew apprising him of developments. On July 10, 2017, Sobien emailed Mayhew advising him that the parties had scheduled negotiations on July 25-27 and August 1-3, in Silver Spring, Maryland. In this email, Sobien wrote:

Our ground rules (number 16) allow either party to invoke the services of FMCS at any time. While I do not believe we are at impasse at this time, I would like to ask you to come by and sit in on a session if you are free any of those days, if for no other reason than to get to know the two teams. We certainly would be open to any suggestions you may have for making the negotiations more productive. We would also be interested in learning more about your Relationship-By-Objectives program.<sup>[8]</sup>

As noted above, on July 21, 2017, the Agency terminated the parties' CBA, 90-plus days after face-to-face negotiations had commenced. That same day, the Union responded to the Agency's notification of termination, pointing out that the services of both FMCS and FSIP had, in fact, been invoked over the course of negotiations and that, therefore, the Agency had no contractual basis to terminate the CBA under Article 29, §3.

On July 24, 2017, the Union filed a grievance under its CBA alleging that the Agency had unilaterally terminated and repudiated the parties' CBA in violation of Article 29, §3 and Section 7116(a)(1) and (5) of the Statute. Among other relief, the Union request-

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<sup>6</sup> The Agency's Office of General Counsel agreed.

<sup>7</sup>The Agency maintains that the 90 day contractual "clock" began to run on April 4, 2017.

<sup>8</sup> Sobien sent a cc of this email to Agency Chief Negotiator Ken Brown.

ed that the Agency rescind its July 21, 2017, termination of the CBA, restore the *status quo ante* pre-CBA termination, and award back-pay where appropriate.

Also, on July 24, 2017, Agency Chief Negotiator Brown emailed Mediator Mayhew advising that in the current circumstances the Agency saw no need for FMCS assistance and that the Agency was not joining in the Union's request for assistance. Brown further noted that the parties' ground rules did not provide for a third-party visit or presentation of the kind contemplated by the Union.

On July 25, 2017, Mediator Mayhew, by email, wrote to Union President Sobien and Brown, stating: "FMCS must received a joint request from the parties before we can assist the parties with collective bargaining mediation."

On August 22, 2017, the Agency denied the Union's grievance on grounds that the Union never properly or timely invoked the services of FMCS or FSIP under Article 29, §3. In the Agency's view, the Union on-the-on-hand requested FMCS/ FSIP assistance too early in the proceedings (during ground rule negotiations) and on-the-other-hand too late in the proceedings (after 90 days from the commencement of face-to-face negotiations in April 2017). Thus, under its interpretation, the Agency's termination of the CBA in July 2017 was proper and consistent with Article 29, §3.

After the Agency denied its grievance, the Union timely invoked arbitration over its grievance. The dispute is before the arbitrator on its merits, there being no procedural issues raised by either party.

The arbitration hearing in this matter was held on December 8, 2017, at NWS offices in Silver Spring, MD. The parties had ample opportunity to examine and cross-examine witnesses under oath, present evidence and advance their respective positions. The proceeding was transcribed by a court reporting service. On February 20, 2018, the parties' counsel filed post-hearing briefs. The record was closed on February 22, 2018.

A. The Position of the Agency

The Agency denies that it violated Article 29, §3 of the parties' CBA when it terminated the CBA on July 21, 2017. It also denies that it violated the Statute in any respect. The Agency stresses that in this case the Union, as the grieving party, has the burden of proof/persuasion in establishing a violation of the CBA and Statute. And, the Union failed to satisfy its evidentiary burden.

As discussed more fully below, critical to the Agency's fundamental position in this matter is that under Article 29, §3 the phrase "formal renegotiation" is synonymous with the actual commencement of face-to-face negotiations, which here, the Agency insists, began on April 4, 2017. According to the Agency, the April 4<sup>th</sup> session triggered the contractual 90-day period. Under the Agency's interpretation of Article 29, §3, the Union had to invoke the services of FMCS/FSIP by c.o.b. July 3, 2017, in order to block the Agency from terminating the CBA. In the Agency's view, requests for FMCS/FSIP assistance made by either side prior to April 4, 2017, including during the duration of ground rule negotiations beginning in 2015, cannot be relied on under Article 29, §3 to block the Agency's July 21, 2017, CBA decision to terminate. In the Agency's view, the only way either party could have blocked the other side from terminating the CBA would have been to invoke the services of FMCS/FSIP between April 4, 2017, and July 3, 2017.<sup>9</sup> Since there is no record evidence that the Union took any such action during the foregoing critical period, its grievance must fail.

The Agency advances seven (7) responses to the Union's claim that it violated Article 29, §3 of the CBA. First, the Union's position herein, if adopted, would permit either party to block CBA termination permanently by invoking the services of FMCS/FSIP at any time in the overall negotiating process for "no meaningful reason."<sup>10</sup> Here, the Agency points out that the Union, because it believed that negotiations with the Agency would be difficult and contentious, prematurely sought FMCS assistance essentially at

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<sup>9</sup> Simply put, in the Agency's analysis, the fact both sides invoked the services of FMCS/FSIP during ground rule negotiations does not count.

<sup>10</sup> In its denial of the Union's grievance, the Agency claimed that the Union had not acted in "good faith" by seeking FMCS so early in ground rule negotiations, an action taken solely to thwart termination.

the beginning of ground rule negotiations. Similarly, before “formal renegotiation” began in April 2017, the Union, again fearing difficult and contentious negotiations, sought FMCS assistance in February 2017, too early to block the Agency’s termination of the CBA.

Additionally, the Agency relies on the FSIP’s rationale in Case No. 86 FSIP 30 (1986), where FSIP ordered the language in Article 29, 3§ to be adopted by the parties: “If negotiations are nevertheless not completed within the 90-day period,<sup>[11]</sup> either party may prevent the terms of the contract from expiring by requesting the services of the Panel by the end of the 90<sup>th</sup> day.” In the Agency’s view, this reasoning supports its interpretation of Article 29, §3 that in the instant case the Union had to invoke FMCS/FSIP assistance between April 4, 2017, and July 3, 2017. Since it did not, the Agency did not violated the CBA.

Second, The Agency contends that the Union’s reliance on Ground Rule 16—“either party may invoke the services of the FMCS at any time”—is “misplaced.” In the Agency’s view, the parties’ ground rules agreement merely establishes procedures for renegotiating the term agreement and as such “[t]hey contribute nothing to the procedures for terminating the old agreement,” and fail to address “termination” at all.

Third, the Agency rejects the Union’s claim that involving FMCS/FSIP at any time during negotiations serves as “incentive” to reaching an agreement. Rather, the Agency contends otherwise that “[o]ne way to incentivize another party to engage in negotiations is to terminate the existing agreement. An interpretation of Section 3 that enabled one party to block termination more than a year before negotiations have even begun would run counter to that end.”

Fourth, the Agency rejects the Union claim that since the Agency originally drafted much of the disputed language before the FSIP in Case No. 86 FSIP 30, the disputed lan-

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<sup>11</sup> Again, this assumes “formal renegotiation” began on April 4, 2017, and not at any time prior.

guage must be construed in favor of the Union. The Agency points out that there is no evidence to support the Union's position, particularly since the FSIP decision was issued in 1986 and since then there have been successor CBAs negotiated by the parties.

Fifth, the Agency reiterates that the Union's request for FMCS assistance prior to April 4, 2017, has no contractual impact on termination and cannot serve to sustain the Union's position herein.

Sixth, the Agency rejects the Union's claim that the Agency terminated the Agreement too late in July 2017 for it to be valid or effective. The Agency notes that nothing in Article 29, §3 limits when the Agency can terminate the CBA once the 90-day period has expired where neither side has invoked the services of FMCS/FSIP during the 90-day period.

Finally, with regard to Article 29, §3, the Agency insists that formal renegotiations "require, at a minimum, an air of formality and some negotiation." It was not until April 2017, that the parties had exchanged proposals and sat down for what the NWSEO President himself described as "the actual negotiation."<sup>12</sup>

In view of the foregoing, the Agency maintains that the Union failed to prove that the Agency violated Article 29, §3, as alleged in the Union's grievance and in arbitration.

With regard the Union's claims that the Agency violated Section 7116(a)(1) and (5) of the Statute, the Agency maintains that it did not "repudiate" the parties' CBA nor did it "bypass" the Union when it issued the July 21, 2017 "broadcast" email to bargaining unit employees announcing that the Agency had terminated the CBA.

The Agency did not repudiate the CBA in July 2017 because it "has taken no steps to pull out of permissive agreements or provisions or terminate any permissive past practic-

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<sup>12</sup> Record evidence shows otherwise—that by April 4, 2017, the parties per agreement had exchanged their first round of substantive bargaining proposals—the Agency in January 2017 and the Union in March 2017.

es or take any other action pursuant to that termination.” Since the Agency has done nothing but terminate the CBA pursuant to contractual authority, without more, the Agency has not repudiated the CBA in violation of the Statute.

The Agency did not bypass the Union in violation of the Statute in its July 21, 2017, “broadcast” email to unit employees. Citing FLRA case law, the Agency emphasizes that to establish a statutory bypass of the Union, an agency must attempt to deal or negotiate directly with unit employees. In the instant case, the Agency’s email merely “informed” unit employees of its decision to terminate the CBA. The email contained “no implicit or explicit promises of benefits or threats.” In statutory terms, the email was benign and did not constitute a statutory bypass.

Finally, with regard to the issues the Union raised at the arbitration hearing that the Agency would not stipulate to, the Agency notes that nothing raised in these issues implicates a statutory violation and, therefore, the Agency declines to respond to these issues.

In view of the foregoing, the Agency denies that it violated Article 29, §3 of the parties’ CBA or the Statute. Accordingly, it requests that the Union’s grievance be denied in its entirety.

#### B. The Position of the Union

Simply stated, the Union maintains that the Agency’s interpretation of Article 29, §3 is incorrect and contrary to substantial undisputed record evidence establishing that FMCS/FSIP assistance was invoked by each side at numerous appropriate times beginning during ground rule negotiations and continuing thereafter. Thus, the Union rejects the Agency’s argument that under Article 29, §3 the Union was too early to seek FMCS/FSIP assistance during ground rule negotiations and too late to seek such assistance after substantive face-to-face negotiations commenced in April 2017.

With regard to the Agency's claim that the Union requested FMCS/FSIP assistance too early in the renegotiation process under Article 29, §3, the Union strongly disagrees with the Agency's position that ground rule negotiations are not part of "formal renegotiations" under Article 29, §3 and that requests for assistance from FMCS/FSIP during this period, in effect, don't count in tolling the relevant 90-day period. Rather, the Union stresses that Article 19, Section 3 "does *not* say that such invocation [of FMCS/FSIP] may only take place once that 90-day period begins." (Emphasis in original.) Thus, at the outset, in July 2015, when Union President Sobien first requested FMCS assistance the Agency never objected and participated in the process. This acquiescence by the Agency undermines its claim that the Union requested FMCS/FSIP assistance too early under Article 29, §3.

Additionally, the Union points out that in the parties' ground rules agreement, they agreed that "either party may invoke the services of FMCS at any time." To the Union, this provision makes it abundantly clear that the Agency's interpretation of Article 29, §3 is incorrect and did not permit the Agency to terminate the CBA in July 2017.

With regard to the Agency's claim that the Union requested FMCS assistance too late in the renegotiation process to block the Agency's decision to terminate the CBA, the Union strongly disagrees. By agreement, the Agency submitted some of its substantive proposals to the Union in January 2017. Based on the time it took the parties to reach a final ground rules agreement and desiring to avoid a repetition of that experience, in February 2017 Union President Sobien requested FMCS assistance by calling FMCS's Baltimore, MD Regional Director. Sobien was told that Mediator Mayhew would be assisting. To be safe, Sobien filed another FMCS Form-7 on February 27, 2017, advising that the parties were in "renegotiation" and that no agreement had been reached. To the Union, the fact that this occurred prior to the first face-to-face substance negotiations is without consequence in this dispute.

Face-to-face negotiations began in April 2017. Record evidence shows that President Sobien was in touch with Mediator Mayhew during the months that followed. In July 2017, Sobien asked Mayhew to attend an upcoming bargaining session. In the Union's view, the foregoing clearly establishes that prior to the end of the 90-day period, the Union had properly invoked the services of FMCS/FSIP, in addition to each side having done so many times before during ground rule negotiations. Therefore, the Agency had no contractual or factual basis to terminate the parties' CBA on July 21, 2017, and by doing so violated Article 29, §3.

The Union also maintains that the Agency violated 5 U.S.C. 7116 (a)(1) and (5) when it "suspended" the parties' CBA, citing in support *Veterans Administration Hospital, Danville, Illinois, and Local 1963 AFGE, AFL-CIO*, 4 FLRA 432 (1980). In this case, among other things, the Agency breached the CBA by requiring medical documentation in a particular circumstance, and denied the Union access to the parties' negotiated grievance procedure.<sup>13</sup>

The Union further contends that the Agency violated 5 U.S.C 7116(a)(1) and (5) when it bypassed the Union and sent a "broadcast" email directly to bargaining unit employees about the CBA termination several hours before it advised the Union that it was terminating the CBA, citing in support *Internal Revenue Service and NTEU*, 4 FLRA 488 (1980).

Additionally, the Union alleges another statutory violation where, in the July 21, 2017, "broadcast" email, the Agency told employees, among other things, that the termination of the CBA "allows the agency and the union to negotiate a superior agreement that aligns with modern needs and operations of our agency and employees." And, that the renegotiation of the CBA "is about enhancing the rights and opportunities that all of

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<sup>13</sup> In the instant case, among other distinctions, the Agency did not deny access to the Union to the grievance procedure.

you deserve.” The Agency email further stated that “terminating the old contract will instill a sense of urgency, and in so doing, help keep negotiations moving.”<sup>14</sup>

In the Union’s view, this statement constitutes an unlawful “promise of benefits” encouraging employees “to pressure the Union to agree to a new contract, citing in support *Division of Military and Naval Affairs, State of New York and New York State Council of Association of Civilian Technicians*, 8 FLRA 301 (1982).

The Union asserts that the Agency’s email was erroneous and misleading in certain respects and incorrectly claimed that the Union had been dilatory in negotiations when, in fact, under the parties’ ground rules agreement, certain Union proposals were not yet scheduled to be submitted to the Agency under their ground rules arrangement.

Finally, the Union contends that the Agency’s July 21, 2017, press release to “Dear Congressional Colleagues” again erroneously portrayed the Union as being dilatory in its approach to negotiations by not submitting its proposals. This Agency conduct and the conduct described above, the Union argues, put the Union in a “false light” and undermined it in the eyes of bargaining unit employees, all in violation of the Statute.

In view of the foregoing, the Union requests that its grievance be sustained in its entirety. Among other requests for relief, the Union requests “[t]hat the notice of termination of July 21 be rescinded,” “that the *status quo ante* be restored with back pay if appropriate under the Back Pay Act,” and “that management cease and desist from bypassing and undermining the NWSEO by communicating directly with the bargaining unit concerning the status of negotiations.” In addition, the Union requests that certain “corrective” emails be issued to involved parties (bargaining unit employees, Congressional offices and the media) to correct the false narrative advanced by the Agency in its July 21, 2017, emails and other issuances.

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<sup>14</sup> The Agency noted in the “broadcast” email how long the parties had been negotiating and that the Union had yet to submit certain proposals.

## **II. The Issues**

At the arbitration hearing, the parties were able to stipulate to three (3) issues in this matter. However, the parties were unable to stipulate to two (2) other issues advanced by the Union. Following are the three (3) issues the parties stipulated to: (1) Did the Agency violate Article 29, §3 of the parties' CBA when it terminated the CBA on July 21, 2017? (2) Did the Agency commit an unfair labor practice (ULP) in violation of 5 U.S.C. §7116 (a)(1) and (5) by repudiating the parties' 2001 CBA? (3) If so, what should the remedy be?

Following are the issues raised by the Union that the Agency maintained were not, in effect, *bona fide* issues in the matter and would not stipulate to: (1) Was Management's [July 21, 2017] broadcast email to the bargaining unit [NWS All Hands] announcing the contract termination a misrepresentation and a bypass of the union? (2) Did Management's [July 21, 2017] letter to Congress and press release also contain misrepresentations and did they place the union in a false light?

## **III. Analysis & Opinion**

I have carefully considered the entire record in this matter, including the testimony of  
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the witnesses, the documentary evidence and the arguments advanced by the parties' counsel in their post-hearing briefs. For the reasons set forth below, I am sustaining the Union's grievance in part and denying it in part. I have concluded that the Agency violated Article 29, §3 of the parties' CBA when it terminated the CBA on July 21, 2017. I have further concluded that the Agency did not violate 5 U.S.C. §7116(a)(1) and (5) as alleged by the Union in its grievance. Finally, I have determined that the Union's claims that the Agency's July 21, 2017, "broadcast" email to bargaining unit employees and its July 21, 2017, press release misrepresented the state of the parties' negotiations and placed the Union in a "false light" do not rise to the level of unfair labor practices in the unique circumstances presented by this dispute. Analysis of these conclusions follows.

A. The Agency's alleged violation of Article 29, §3 of the CBA

Fundamental to the resolution of this dispute is a determination as to when the parties' commenced "formal renegotiation" of their CBA. The Union maintains that "formal renegotiation" began when ground rules negotiations began, in 2015; the Agency maintains that "formal renegotiation" began on April 4, 2017, when the parties first met face-to-face for substantive negotiations.

It is obvious that Article 29, §3 is silent as to what the parties intended the "start of formal renegotiation" to mean. Nor does the FSIP's explanation in 86 FSIP 30 resolve the question. By excluding ground rule negotiations as the "start of formal renegotiation" in this particular case, the Agency ignores the following undisputed record evidence. In the summer of 2015, the Agency informed the Union that it wanted to renegotiate the CBA. As required, the parties entered into ground rule negotiations. Around that time, the Union invoked the services of FMCS. FMCS Mediator Scudery worked with the parties. Unable to resolve initial official time and travel disputes, the Agency requested FSIP assistance. On September 23, 2017, these issues were resolved in Case No. 15 FSIP 118.

The parties renewed their ground rule negotiations. Mediator Scudery assisted the parties. Once again, the Agency requested FSIP assistance but this time FSIP refused to take the dispute. In March 2016, the parties resumed their ground rule negotiations with the assistance of Mediator Concordia in March and May 2016. Again at impasse over one remaining issue (on a separate track, the parties had reached agreement on the other disputes), the Agency sought FSIP assistance. FSIP took the dispute and scheduled a mediation/arbitration proceeding led by FSIP Chair Jacksteit. On December 7, 2016, with the assistance of FSIP, the parties resolved their remaining impasse.

The Agency then submitted the ground rules agreement for Agency head review, which was approved on December 9, 2016.

The foregoing bargaining history of ground rule negotiations in this matter strikes me as hardly “informal” and every bit “formal.” The foregoing history contains all of the indicia of “formal” negotiations whether “substantive” or not; we see extended bargaining, an agreed-upon six (6) page, 28 paragraph MOU on ground rules,<sup>15</sup> FMCS/FSIP participation on numerous occasions, all followed by Agency head review and approval of the ground rules agreement pursuant to the Statute. If these were not worthy “formal” negotiations, there would have been no need for Agency head review under the Statute. In the circumstances of this case, I therefore find that “formal renegotiation” under Article 29, §3, reasonably construed, began when ground rule negotiations began. Consequently, when the Union and Agency requested FMCS/FSIP assistance during the ground rule negotiation period, either party’s right to terminate the CBA expired under the unambiguous terms of Article 29, §3. This analysis, standing alone, provides a sufficient basis to sustain the Union’s grievance (in part).

However, assuming *arguendo*, that “formal renegotiation” under Article 29, §3 does not include any time spent on ground rule negotiations (perhaps a more private sector notion), as the Agency maintains, I would nonetheless still reach the same result. I see no support in the record or the CBA for the Agency’s central claim that “formal renegotiation” began on April 4, 2017, when substantive face-to-face negotiations began. In my view, a more reasonable date for the “start of formal negotiations” in this particular case occurred in January 2017 when the Agency submitted its first round of substantive bargaining proposals to the Union, followed by the Union reciprocating in March 2017. Assuming ground rule negotiations are excluded from the analysis, this exchange of proposals triggered the 90-day “clock,” not the first face-to-face meeting on April 4, 2017. Since the parties and the negotiators were quite familiar with each other by April 4<sup>th</sup>, having started their negotiations in 2015, the face-to-face meeting was merely another step in the overall negotiating process and cannot reasonably be said to have any impact

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<sup>15</sup> Exclusive of the settlement agreement reached by the parties on December 7, 2016, under FSIP proceedings.

on when “formal renegotiation” would start, for the purposes of CBA termination, in this particular case.

Again, for the sake of argument and completeness, since I have concluded that “formal renegotiation” began in January 2017, the Union, within the next 90 days timely invoked the services of FMCS. This occurred twice in February 2017; first, when Union President Sobien spoke with FMCS’s Baltimore Regional Director and again thereafter when Sobien filed a Form F-7 with FMCS seeking its assistance. These actions fully comply with the requirements set forth in Article 29, §3 to “block” CBA termination.

Moreover, record evidence shows that Sobien was in touch FMCS Mediator Mayhew during the 90-day period commencing in January 2017 and thereafter. While there is a dispute as to whether Mayhew’s services had been properly requested by the parties, and whether he could in fact assist them, it must be noted that Article 29, §3 only requires that services of FMCS/FSIP be “invoked.” Numerous standard dictionaries define the word “invoke” (paraphrasing) “to call for, appeal, petition for assistance.” There is no requirement in Article 29, §3 that either FMCS/FSIP accept the request for assistance.

Finally, it must be emphasized that in the parties’ ground rules agreement (para. 16), they agreed that “[e]ither party may invoke the services of the FMCS at any time[.]” I construe this provision as meaning exactly what it says; the Agency has provided no persuasive or reasonable argument to the contrary. Clearly, this provision was intended to apply prospectively to the parties’ when they reached the stage of substantive negotiations. Nothing in the record suggests that the Union acted contrary to, or in violation of, para. 16 of the parties’ ground rule agreement. Therefore, the Union timely “invoked” the assistance of FMCS.

In view of the foregoing, I find that the Agency violated Article 29, §3 of the parties’ CBA when it terminated the CBA on July 21, 2017.

B. The Agency's alleged violation(s) of Section 7116(a)(1) and (5) of the Statute

I am unable to agree with the Union's allegations that by its conduct as described above, the Agency (1) "repudiated" the parties' CBA on July 21, 2017, and (2) unlawfully "bypassed" the Union in violation of the Statute on July 21, 2017, when the Agency issued its "broadcast" email to bargaining unit employees about the state of the parties' negotiations for a new CBA.

With regard to the alleged "repudiation" of the parties' CBA, the record contains no evidence that the Agency repudiated the CBA or any provision therein. While the Agency "terminated" the Agreement pursuant to its interpretation of Article 19, §3, all provisions of the CBA remain in effect to date and there is no evidence to the contrary. The fact that the Union grieved the Agency's termination of the CBA, culminating in arbitration, undermines the Union's claim that the Agency repudiated the CBA in violation of the Statute. The allegation that the Agency violated Article 29, §3 when it terminated the CBA in the instant circumstances is not tantamount to a repudiation of the CBA under applicable law.

With regard to the alleged bypass of the Union when the Agency issued its July 21, 2017, "broadcast" email directly to unit employees before it apprised the Union that it was terminating the CBA, there is no evidence that the Agency dealt directly with any unit employee. Well-established case precedent requires that to find a bypass violation of the Statute, the Agency must deal directly with unit employees.

Accordingly, the Union's allegations that the Agency violated 5 U.S.C. §7116(a)(1) and (5) when it terminated the parties' CBA on July 21, 2017, are denied.

C. The other issues raised by the Union (Misrepresentations and "false light")

I construe the Union's "other issues" as fundamentally contending that the Agency sought to undermine the Union in the eyes of bargaining unit employees (1) by advising

unit employees *via* “broadcast” email on July 21, 2017, that it was terminating the CBA several hours before it advised the Union that it was doing so and (2) by suggesting in the email that the Union was dilatory in performing its collective bargaining responsibilities as exclusive bargaining agent for unit employees.

While I am troubled by the Agency’s conduct described above, I am unable to agree with the Union that the Agency’s conduct rose to the level of an unfair labor practice under the Statute in the unique circumstances presented by this dispute.<sup>16</sup> Rather, I construe the July 21, 2017, email in its entirety as a precatory expression of the Agency’s interest in moving forward with CBA negotiations presented in a light most favorable to the Agency (described otherwise by the Union as “propaganda”). As noted by the Union, the email did not provide a complete and accurate picture of the state of the parties’ negotiations in July 2017 but, in my view, (1) releasing this email to unit employees several hours before sending it to the Union and (2) presenting an incomplete assessment of negotiations by the Agency cannot be reasonably construed as rising to the level of violations of the Statute. Moreover, there is no record evidence that the email at issue had any impact on unit employees and the Union provided no case law where facts and circumstances like those present in the instant case were found by the FLRA/NLRB to constitute a violation of the Statute and/or Act<sup>17</sup>, respectively.<sup>18</sup>

Accordingly, I find that the Agency did not undermine the Union in violation of the Statute by its conduct described above.

In view of the foregoing, I am sustaining the Union’s grievance in part and denying it in part. An appropriate remedy is set forth below in the Award.

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<sup>16</sup> I further find that the Agency’s July 21, 2017, press release and congressional issuance did not violate the parties’ CBA or the Statute.

<sup>17</sup> National Labor Relations Act, as amended.

<sup>18</sup> In *Union Electric Co.*, 196 NLRB 830 (1972), in circumstances where the employer communicated directly with unit employees about a job vacancy, the Board declined to find a violation of the Act because the conduct there had no negligible effect on the Union’s role as bargaining representative. In the instant case, there is no evidence that the Agency’s direct communication with unit employees had any impact on them or the Union, as bargaining representative.

#### **IV. The Award**

For the reasons set forth above, the Union's July 24, 2017, grievance is sustained in part and denied in part. The Agency violated Article 29, §3 of the parties' CBA when it terminated the CBA on July 21, 2017. The Agency did not violate Section 7116(a)(1) and (5) of the Statute, as alleged by the Union. To remedy the Agency's violation of Article 29, §3 of the CBA, the Agency shall:

1. Rescind its July 21, 2017, Notice of CBA Termination in its entirety;
2. Return to the contractual *status quo ante* pre-CBA termination;
3. Within 10 days after this Award becomes final and binding, the Agency, in writing, shall advise the Union's president that its July 21, 2017, Notice of CBA Termination has been rescinded and that the *status quo ante* pre-CBA termination has been restored.
4. No other remedy was found to be necessary or warranted in this matter.

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Laurence M. Evans  
Arbitrator

March 1, 2018  
Rockville, MD



