Office of Congressional Workplace Rights
LA 200, John Adams Building 110 Second Street, SE
Washington, DC 20540-1999

UNITED STATES CAPITOL POLICE, Respondent, and FRATERNAL ORDER OF POLICE, DISTRICT OF COLUMBIA LODGE NO. 1 U.S. CAPITOL POLICE LABOR COMMITTEE, Charging Party.	)	Case No. 20-LMR-01 (CA)

Before the Board of Directors: Barbara Childs Wallace, Chair; Susan S. Robfogel; Alan V. Friedman; Roberta L. Holzwarth; Barbara L. Camens, Members.

ORDER

The above-captioned matter concerns the provisions of the Congressional Accountability Act that apply the unfair labor practice prohibitions of the Federal Service Labor Management Relations Statute to employees, employing offices, and labor organizations in the legislative branch. 2 U.S.C. § 1351. The charging party (Union) requests that the Board publish the hearing officer's January 29, 2021 Decision on Motions for Summary Judgment. For the reasons set forth below, we grant the Union's request.

The Union's request is governed by 2 U.S.C. section 1416(e), which provides:

> A final decision entered under section 1405(g) or 1406(e) of this title shall be made public if it is in favor of the complaining covered employee, or in favor of the charging party under section 1331 of this title, or if the decision reverses a decision of a hearing officer which had been in favor of the covered employee or charging party. The Board may make public any other decision at its discretion.

See also OCWR Proc. Rule § 1.06(d). Here, although the hearing officer's decision was entered under section 1405(g), it is still potentially subject to review by the Board under section 1406.[1] Therefore, the Union's request concerns the Board's discretionary authority under section 1406(e) to publish non-final decisions.

The OCWR General Counsel suggests that the determination of whether to publish a non-final decision ultimately involves weighing the public interest in transparency against the potential privacy interests of the litigants. We agree.

In determining the nature and extent of the public interest in transparency in this case, we note that this matter concerns the USCP's suspension of the parties' current collective bargaining agreement during the COVID-19 pandemic. Publication of the hearing officer's decision will allow the Union to exercise its right, if not obligation, to inform bargaining unit members who are directly affected by the decision. Certainly, employees whose working conditions are governed by that collective bargaining agreement have a compelling interest in understanding how the hearing officer's decision affects them. Moreover, resolution of this dispute with as much transparency as possible will promote public confidence in the OCWR's decision-making processes.

The USCP has failed to demonstrate that there are any countervailing privacy interests that would outweigh the public interest in transparency in this case. Although the USCP indicates that it intends to appeal the decision to the Board, publication of the decision has no effect on the appeal rights of the USCP.

Nor do the confidentiality provisions of the CAA or the Procedural Rules weigh against publication of the decision. As the OCWR General Counsel correctly notes, unfair labor practice proceedings are subject to the confidentiality provision set forth in 2 U.S.C. § 1416 and OCWR Procedural Rule § 1.08. The statute provides that, *"[e]xcept as provided in subsections (c), (d), and (e),* all proceedings and deliberations of hearing officers and the Board, including any related records, shall be confidential." 2 U.S.C. § 1416(b) (emphasis added); *see also* OCWR Procedural Rule § 1.08(c) (parties may not disclose "a written or an oral communication that is prepared for the purpose of or that occurs during the confidential advising process, mediation, or the proceedings or deliberations of Hearing Officers or the Board."). Without deciding whether the confidentiality provisions of section 1416 and Procedural Rule 1.08 regarding "proceedings" or "deliberations" apply to a hearing officer's decision, those provisions must be read in conjunction with section 1416(e), which grants the Board the broad authority to "make public any [non-final] decision at its discretion."

[1] We express no opinion on the merits of the hearing officer's decision, which are not presently before us.

Accordingly, we conclude that the public interest in transparency strongly favors publication of the hearing officer's decision in this case.

ORDER

The Board directs the Executive Director to publish the hearing officer's January 29, 2021 Decision on Motions for Summary Judgment on the OCWR's public website without undue delay.

It is so ORDERED.

Issued, Washington, DC, February 17, 2021

OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS
LA 200, John Adams Building, 110 Second Street, SE
Washington, DC 20540

FRATERNAL ORDER OF POLICE, DISTRICT OF COLUMBIA LODGE NO. 1, U.S. CAPITOL POLICE LABOR COMMITTEE (Charging Party) and UNITED STATES CAPITOL POLICE (Respondent)	Case No. 20-LMR-01 (CA)

Johh D. Uelmen, Esq., and Lilliam Mendoza-Toro, Esq., for the General Counsel.
Megan K. Mechak, Esq. for the Charging Party.
Kelly M. Scindian, Esq., April M. Rancier, Esq., Britney D. Berry, Esq., and Aaron M. Wilensky, Esq., for the Respondent.
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DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Statement of the Case

Bruce D. Rosenstein, Hearing Officer. This case was initiated pursuant to a complaint issued by the General Counsel (GC) of the Office of Congressional Workplace Rights (OCWR). The complaint, based upon a charge filed on March 23, 2020,[1] by Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee (the FOP or Union), alleges that United States Capitol Police (the Respondent or USCP), has engaged in certain violations of 5 U.S.C. §§ 7116(a)(1), (5), and (8), when it suspended the parties' current collective bargaining agreement (CBA-GC Ex.1) during the COVID-19 pandemic and refused to negotiate to resolution or impasse regarding changed working conditions for employees resulting from that

[1] All dates are in 2020 unless otherwise noted.

suspension.

CAA § 220(a) (1) applies the rights, protections, and responsibilities established under 5 U.S.C. §§ 7102, 7106, 7111-7117, 7119-7122 and 7131 to employing offices and employees, including the Respondent and the USCP employees within the bargaining unit. The Respondent filed a timely answer to the complaint denying that they had committed any violations of the CAA.

STANDARDS FOR SUMMARY JUDGMENT

Motions for Summary Judgment filed under §2423.27 of the Rules[2] and Regulations of the Federal Labor Relations Authority (FLRA or Authority), and OCWR Procedural Rule 5.03 (d), serve the same purpose and have the same requirements as Motions for Summary Judgment filed with the United States District Courts pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.,* 50 FLRA 220, 222 (1995); *Steven Patterson v. Office of the Architect of the Capitol,* Case No. 07-AC-31 (RP), April 21, 2009. The GC and the Union (declaration in support of OCWR) filed Motions for Summary Judgment on December 15, and the Respondent filed a Cross Motion for Summary Judgment on January 15, 2021.

Findings of Fact

1. Respondent is an "employing office" within the meaning of CAA Sections 101(9) and 220(a) (1). Respondent is the employing office which employs the bargaining unit employees and has offices in Washington, DC.

2. The FOP is a labor organization that has been duly certified by the Executive Director of the OCWR on behalf of the OCWR Board of Directors pursuant to CAA Section 220(c)(1) as the exclusive representative of the Respondent's officers who are included in the defined and/or clarified bargaining unit.

3. On March 19, during a regularly scheduled meeting, the FOP disagreed with the Respondents decision to suspend the parties' CBA. The USCP declined to have a discussion or otherwise bargain with the FOP.

[2] § 2423.27 provides that affidavits may be submitted as part of Motions for Summary Judgment.

4. On March 20, the USCP issued a letter to the FOP declaring that the entire CBA was suspended indefinitely, effectively immediately, due to the COVID-19 pandemic (GC Ex. 2 and R Ex. 1).

5. The USCP did not explain in its March 20 letter to the FOP why the pandemic required the suspension of the parties' CBA in its entirety to carry out its mission.

6. On April 17, the USCP emailed a letter to the FOP extending the CBA suspension for 30 days (GC Ex. 5 and R Ex. 10).

7. On May 15, the USCP emailed another letter to the FOP extending the suspension for an additional 30 days (GC Ex.8). On June 15, the USCP sent a third letter to the FOP extending the suspension for an unspecified period (GC Ex. 13 and R Ex. 10).

8. On May 7, the USCP sent a letter to Congressman Steny H. Hoyer regarding the suspension of the parties' CBA and changes to USCP operations (GC Ex. 7 and R Ex. 3). The Union did not learn about the changes to operations that impacted on conditions of employment until it was provided a copy of the letter on or about May 7.

9. At no time between March 20 and June 15, did the USCP engage in any type of bargaining with the FOP regarding the suspension of the parties' CBA.

10. After the suspension of the parties' CBA, the USCP made unilateral changes in conditions of employment of bargaining unit employees without providing notice to the FOP or engaging in any bargaining with the Union. Such changes included department operations, administrative functions, safety measures, and methods of direct communications with bargaining unit employees. In addition, the USCP suspended the grievance arbitration provisions of the parties CBA asserting that in a pandemic situation, not only does the Department not have the time to engage in protracted litigation over its directives, it is not in the interest of the Department's mission or the health and well-being of its workforce to have an outside third party, with no law enforcement experience, second guessing decisions intended to protect the workforce and ensure the continuity of operations.

11. On July 15, the USCP sent a letter to the FOP advising that it was reinstating the following articles of the CBA effective immediately (GC Ex. 14 and R Ex. 8).

    - Article 1-Parties to Agreement; Article 6-No Strike No Lockout Clause; Article 9-Union Dues Allotment; Article 10-Names of Employees and Communications; Article 11-Official Time; Article 12-Organizational Leave; Article 14-Union Use of Department Facilities and Services; Article 20-Holidays; Article 33-Equal Employment Opportunity; Article 34-Employee Assistance Program; Article 37-Daycare.

12. On August 14, the USCP sent a letter to the FOP advising that it was reinstating the following articles of the CBA effective immediately (GC Ex. 17 and R Ex. 9).

- Article 7-Requests for Information; Article 13-Emploee Personnel Files; Article 16-Seniority; Article 21-Excused Absence During Hazardous/Geological/Weather Conditions; Article 22-Position Descriptions; Article 23-Vacancy Announcements for Positions within the Bargaining Unit; Article 24-Uniform and Equipment Committee; Article 25-Cooperative Labor-Management Relations; Article 27-Personnel Performance Notes (CP-550 & 550 A); Article 28-Injury Compensation; Article 29-Tardiness; Article 30-Rights of Officers Under Investigation; Article 31-Disciplinary Actions/Corrective Actions; Article 35-Addressing Employees Rollcall, Recruits, In-Service; Article 36-Outside Employment; Article 39-Reduction in Force; Article 40-Effective Date, Duration, Amendments and Renewal.

13. On September 14 and October 14, the USCP sent a memorandum to the FOP confirming the continued suspension of the parties' CBA (GC Ex. 18, 19 and R Ex. 10).

14. The following articles of the parties' CBA are still suspended.

    - Article 2-Governing Laws, Policies and Regulations; Article 3-Management Rights; Article 4-Bargaining Unit Officer Rights; Article 5-Union Rights and Responsibilities; Article 8-Changes in Conditions of Employment; Article 15-Locker Rooms/Showers/Break Rooms; Article 17-Assignments, Transfers and Details; Article 18-Basic Work Period and Overtime; Article 19-Leave; Article 26- Safety and Health; Article 32-Grievances/Arbitration Procedures; Article 38-Contracting Out.

15. On November 13, the USCP sent a memorandum to the FOP confirming the continued suspension of the parties' CBA, with previous modifications reinstating certain Articles (GC Ex. 20 and R Ex.10).

16. On December 11, the USCP sent a memorandum to the FOP confirming the continued suspension of the parties' CBA (GC Ex. 21 and R Ex. 10).

POSITION OF THE PARTIES

General Counsel and the Union

The GC and the Union argue that the USCP committed an unfair labor practice in violation of 5 U.S.C. §§ 7116 (a)(1), (5), and (8), which are incorporated by reference in CAA Section 220(a)(1), when on March 20, it unilaterally suspended the entire CBA without permitting or engaging in any type of collective bargaining with the FOP. Additionally, the complaint alleges that on or after March 20, the Respondent unilaterally changed the working conditions of FOP bargaining unit employees without permitting or

engaging in any type of collective bargaining with the FOP. Lastly, the complaint asserts that the Federal Service Labor-Management Relations Statute (Statute) requires that a collective bargaining agreement contain procedures for the settlement of grievances and that any grievance not satisfactorily settled under the procedure be subject to binding arbitration. An agency's refusal to participate in the arbitration process pursuant to a negotiated grievance procedure conflicts with § 7121, and therefore violates §§ 7116(a)(1) and (8) of the Statute.

Respondent

The Respondent asserts that an emergency existed in accordance with 5 U.S.C. § 7106(a)(2)(D) (as incorporated by Section 1351 of the CAA) and Article 8 of the parties' CBA that privileged its suspension due to the Covid-19 pandemic. Additionally, the Respondent argues that the suspension of the parties' CBA is covered by Section 8.04 of the Agreement and, therefore, is not subject to impact and implementation bargaining under the CAA.

LEGAL AUTHORITIES

An agency is obligated to negotiate over matters that are within the duty to bargain, even though the union has not submitted specific proposals, unless the parties' collective bargaining agreement states otherwise. See *U.S. Dep 't of Def., Def. Commissary Agency, Peterson AFB, Colo. Springs Colo,* 61 FLRA 688, 694, & n.5 (2006), (DOD). In this regard, the Authority has held that "an agency violates the Statute when it expressly refuses to negotiate over a matter within the duty to bargain, even if the refusal occurs before an exclusive representative has submitted bargaining proposals, given that the refusal renders submission futile." *Am. Fed. Of Gov't Employees, Local 1401,* 67 FLRA 34, 36 (2012).

Management's rights, under § 7106(a)(2)(D), permits an agency to take whatever actions may be necessary to carry out its mission during emergencies that includes the right to (1) independently access whether an emergency exists; and (2) decide what actions are needed to address the emergency. *U.S. Dep' t of Veterans Affairs, VA Reg'l Office, St. Petersburg Fla.,* 58 FLRA 549, 551 (2003). Proposals that define "emergency" affect management's rights. However, not every proposal relating to agency actions taken to carry out the agency mission during emergencies is necessarily nonnegotiable under §7106(a)(2)(D). As the Authority explained in *Nat 'l Treasury Employees Union, Chapter 22,* 29 FLRA 348, 349 (1987), "only proposals which either directly interfere with agency action or prevent the agency from taking the emergency action are inconsistent with section 7106(a)(2)(D) and, therefore, are nonnegotiable." Proposals that affect the exercise of management's rights under §7106(a)(2)(D) of the Statute may nevertheless be negotiable, either because they are procedures within the meaning of §7106(b)(2) of the Statute, or because they are appropriate arrangements within the meaning of §7106(b)(3) of the Statute. As written, the Statute does not remove the subject matter. identified in §7106(a)(2)(D) entirely from the obligation to bargain, that is, by the terms of section 7106, that subsection remains subject to subjection (b) of that section. Subsection (b) operates to preserve, among other things, negotiation of procedures and appropriate arrangements related to the terms identified in subsection (a). Thus, the terms of section 7106 indicate that an obligation to bargain over procedures and appropriate arrangements applies to §7106(a)(2)(D) as well as the other portions of subsection (a).

For example, a useful analog exists with respect to bargaining obligations in circumstances involving the implementation of changes necessary to correct an unlawful practice. In these situations, the agency may lawfully implement the changes without prior bargaining and is only obligated to bargain after implementation over impact and

implementation of the change. See *INS,* 55 FLRA 69, at 73 n. 8 (1999).

A determination as to whether a matter excessively interferes with a management right is reached by weighing the benefit to employees against the burden on the exercise of the management rights involved. *Am. Fed. Of Gov't Employees, Council of Prison Locals 33, Local 506,* 66 FLRA 929, 932 (2012).

The Authority held in *Dep' t of Veterans Affairs, VA Regional Ofc., Fla.,* 58 FLRA 549, 551 (2003) that an agency is *not* free to "label any particular set of circumstances an emergency and act unilaterally." Agency claims of an emergency justifying unilateral action are not unreviewable. If such claims are not supported by the record, they will not be sustained. *Army and Air Force* Exchange Service and Army and Air Force Exchange Service, Oakland Army Base Oakland, Calif., 25 FLRA 740 (1987) (Authority upheld judges finding that no emergency justified unilateral change in license verification policy).[3]

The "covered by" doctrine excuses parties from bargaining when they have already bargained and reached agreement concerning the matter at issue. *IRS,* 63 FLRA 616, 617 (2009). To assess whether a particular matter is covered by a collective bargaining agreement, we apply a two-pronged test. *Nat 'l Air Traffic Controllers Assoc.,* 66 FLRA 213, 216 (2011). Under the first prong, we examine whether the subject. matter is expressly contained in the agreement. An exact congruence of language is not. required, instead, the matter is "covered" if a reasonable reader would conclude that the contract provision settles the matter in dispute. The Authority has found the subject matter of proposals not to be contained in a contractual provision when the proposals did

[3] The term "emergency" has been defined as an unforeseen combination of circumstances which calls for immediate action, however, there is no emergency where the situation permits the exercise of discretion. "Where a change in the work schedule is fully justified, the question still may be presented as to whether the agreement or the circumstances impose a duty on the employer to notify the employees of the change, or at least to make a reasonable effort to give notice. *Elkouri & Elkouri, How Arbitration Works, 6th Ed.* at page 733, 735.

not modify or conflict with the express terms of the provision, even when the proposal concerned the same general range of mattes addressed in the contractual provision. See *Nat 'l Air Traffic Controllers Assoc 'n,* 61 FLRA 437, 441-42 (2006), and cases cited therein.

If the agreement does not expressly contain the matter, then, under the second. prong of the doctrine we consider whether the subject is inseparably bound up with, and is plainly an aspect of, a subject covered by the agreement. *Nat 'l Treasury Employees Union, Chapter* 160, 67 FLRA 482, 483 (2014). In doing so, we consider the parties' intent and bargaining history. *Nat 'l Fed 'n of Fed. Employees, Fed. Dist.1, Local* 1998, *IAMAW,* 66 FLRA 124, 126 (2011). A matter must be more than tangentially related to a contract provision to be covered by the agreement. Rather, the party asserting the "covered by" argument must demonstrate that the subject matter of the proposal is so. commonly considered to be an aspect of the matter set forth in the collective bargaining agreement that the negotiations that resulted in that provision of the agreement are presumed to have foreclosed further bargaining over the matter. One of the factors to consider is whether the contract provisions "comprehensively addressed" the subject at issue.

WHETHER SUSPENDING THE PARTIES' CBA WAS AN "EMERGENCY" UNDER §7106 OF THE STATUTE

As noted above, an agency claims of an emergency justifying unilateral action are not unreviewable. If such claims are not supported by the record, they will not be sustainable. The term "emergency" has been defined as an unforeseen combination of circumstances which calls for immediate action, however, there is no emergency where the situation permits the exercise of discretion.

Section 8.02 of the parties' CBA provides in pertinent part that before

implementing a management decision, the Department will notify the Union's Chairman or other designated representative of the proposed or anticipated change in writing, and as far in advance as possible but generally not later than twenty-one (21) days before implementation. Less than twenty-one (21) day notice may be given because of exceptional or unforeseen circumstances.

On March 19, during a regularly scheduled meeting, the USCP informed the FOP of its decision to suspend the CBA and declined to have a discussion or otherwise bargain with the FOP.

On March 20, the USCP issued a letter to the FOP declaring that the entire CBA was suspended indefinitely, effective immediately, due to the Covid-19 pandemic. The USCP did not explain in its March 20 letter, why the pandemic required the suspension of the parties' CBA in its entirety to carry out its mission.

While the CBA provides notice may be given less than 21 days because of exceptional or unforeseen circumstances, it is noted that the Covid-19 virus was not an unforeseen circumstance as it arrived in the United States prior to March 19. Rather, the Respondent determined to give the FOP notice on the same day that it informed them that the CBA would be indefinitely suspended in its entirety. Moreover, the USCP never explained to the FOP why it was necessary to suspend the CBA on March 19 and 20, nor the rationale for declining to have a discussion or otherwise bargain about the decision or impact and implementation of the CBA's indefinite suspension.

As it concerns section 8.04 (1-3) of the CBA, it is noted that it addresses "Suspension of Provision(s) of the Agreement." There is no language in those sections that contemplates the suspension of the entire CBA.[4] Thus, it appears that the

[4] As set forth in the Declaration of Acting Chief of Police Yogananda D. Pittman, the USCP has since 2003 suspended individual provisions of the CBA on at least fifteen separate occasions. On September 27, 2013, the USCP for the first time, suspended the entire CBA because of a Government Shutdown. In this regard, due to a lack of

suspension of the parties' entire CBA is not "comprehensively addressed" under section 8.04 of the Agreement.[5] Rather, the Union recognized in section 8.04 that to carry out the Department's mission during emergency situations, it may be necessary to suspend temporarily the implementation of *provisions* of the Agreement that would prevent or impede accomplishment of the mission. Likewise, the determination by the Respondent on July 15 and August 15, to unilaterally reinstate articles in the CBA, undermines its position that there was a continued emergency in carrying out its mission that prevented collective bargaining between the parties. Moreover, it strains credulity that it was necessary for the Respondent to suspend over 40 articles and approximately 200 provisions in the parties' CBA to carry out its mission when declaring the pandemic an "emergency." It logically follows that if the Respondent needed to change working conditions or other pressing matters, it could have acted to address those issues without unilaterally suspending the entire CBA.[6]

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funding authority, the USCP and other Federal Agencies, were required to shutdown consistent with the requirements of the Anti- Deficiency Act (ADA) that mandates employees must be furloughed. That requirement prohibits employees from reporting to work and engaging in work activities unless they are exempted from the furlough. It is noted, however, that in a Government Shutdown that occurred in 2018, the USCP did not suspend the entire CBA. Rather, it suspended several Articles or portions of Articles (5 Articles in total) to address the Government Shutdown. Thus, I conclude that the bargaining history of the parties', does not support the Respondent's position that Article 8 of the CBA permits the suspension of their entire Agreement without engaging in collective bargaining with the FOP. Moreover, the effects of a Government Shutdown do not permit any discretion when implemented in comparison to the facts that were presented in March 2020, when the parties' CBA was suspended in its entirety due to the Pandemic.

[5] In *IRS,* 47 FLRA 1091, 1103-1104 (1993), the Authority held that administrative law judges will determine the meaning of the parties' CBA and will resolve the unfair labor practice complaint allegations. In the subject case, as the designated Hearing Officer, I have applied that process.

[6] It is noted that in the May 7 letter to Congressmen Stenny H. Hoyer (GC Ex. 7 and R Ex. 3), the Respondent did not explain why it was necessary to suspend the parties' entire CBA. Rather, it only addressed two provisions relating to changes in conditions of employment and procedures relating to arbitration to support its position that the entire CBA needed to be suspended to carry out its mission during the pandemic. The GC cites in its Motion for Summary Judgment the case of *NTEU v. Chertoff,* 452 F. 3d 839 (D. C. Cir. 2006) for the proposition that the unilateral abrogation of a lawfully negotiated

Based on the foregoing recitation, I find that the Respondent, when it unilaterally suspended the parties' CBA on March 19 and 20, abused its discretion in not following the terms of the parties' agreement of giving notice and explaining to the Union why suspending the entire CBA was a true emergency that prevented collective bargaining between the parties.

Under those circumstances, I find that the Respondent committed an unfair labor practice in violation of 5 U.S.C. §§ 7116(a)(1), (5), and (8), when on March 19 and 20, it unilaterally suspended the entire CBA without allowing for or engaging in substantive bargaining with the FOP. Likewise, the Respondent committed an unfair labor practice in violation of 5 U.S.C. §§ 7116(a)(1) and (8), when it suspended and refused to reinstate the grievance and arbitration provisions contained in Article 32 of the CBA, contrary to the order issued in *United States Capitol Police and Fraternal Order of Police,* 15-LMR-02 (CA) (OCWR Board 9/25/2017). Under 5 U.S.C. §7121(b)(C)(iii), all negotiated grievance procedures must provide for binding arbitration of unresolved grievances and questions of arbitrability. Indeed, in *United States Capitol Police v. Office of Compliance,* 908 F.3d 776, 782-83 (Fed. Cir.2018), the Federal Circuit specifically recognized that the USCP has a duty to bargain over procedures and appropriate arrangements covered by §§ 7106(b)(2) & (3).

WHETHER THE RESPONDENT WAS REQUIRED TO ENGAGE IN IMPACT AND IMPLEMENTATION BARGAINING WITH THE FOP

Contrary to the Respondent's position that it had no obligation to negotiate over the impact and implementation of its suspension of the parties' CBA, it is noted that, Article 2, Section 2.01 of the parties' CBA provides that in the administration of all

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collective bargaining agreement is unlawful. While the case did not address 5 U.S.C. § 7106(a)(2)(D), the legal reasoning of the court is compelling and instructive.

matters covered by this agreement, the parties and all bargaining unit officers are governed by existing and future laws including provisions of the Statute (Chapter 71 of Title 5 of the U.S. Code; 5 U.S.C. 7102, 7106, 7111 through 7117, 7119 through 7122 and 7131, as applied by Section 220 of the CAA, and laws, resolutions, regulations, policies, decisions, and directives of courts of jurisdiction or appropriate Congressional Authority.

An agency is obligated to negotiate over matters that are within the duty to bargain, even though the union has not submitted specific proposals, unless the parties' collective bargaining agreement states otherwise. See *U.S. Dep 't of Def., Def. Commissary Agency, Peterson AFB, Colo. Springs Colo,* 61 FLRA 688, 694, & n.5 (2006). In this regard, the Authority has held that "an agency violates the Statute when it expressly refuses to negotiate over a matter within the duty to bargain, even if the refusal occurs before an exclusive representative has submitted bargaining proposals, given that the refusal renders submission futile." *Am. Fed. Of Gov't Employees, Local 1401,* 67 FLRA 34, 36 (2012).

Management's rights, under § 7106(a)(2)(D), permits an agency to take whatever actions may be necessary to carry out its mission during emergencies that includes the right to (1) independently access whether an emergency exists; and (2) decide what actions are needed to address the emergency. *U.S. Dep' t of Veterans Affairs, VA Reg'l Office, St. Petersburg Fla.,* 58 FLRA 549, 551 (2003).[7] Proposals that define "emergency" affect management's rights. However, not every proposal relating to agency actions taken to carry out the agency mission during emergencies is necessarily nonnegotiable under §7106(a)(2)(D). As the Authority explained in *Nat 'l Treasury*

[7] It is noted that this case is cited by the Respondent in its Cross-Motion, however, the Authority upheld the Arbitrator's Award finding that no emergency existed under 5 U.S.C. §7106 (a)(2)(D).

Employees Union, Chapter 22, 29 FLRA 348, 349 (1987), "only proposals which either directly interfere with agency action or prevent the agency from taking the emergency action are inconsistent with section 7106(a)(2)(D) and, therefore, are nonnegotiable". Proposals that affect the exercise of management's rights under §7106(a)(2)(D) of the Statute may nevertheless be negotiable, either because they are procedures within the meaning of §7106(b)(2) of the Statute, or because they are appropriate arrangements within the meaning of §7106(b)(3) of the Statute. As written, the Statute does not remove the subject matter identified in §7106(a)(2)(D) entirely from the obligation to bargain, that is, by the terms of section 7106, that subsection remains subject to subjection (b) of that section. Subsection (b) operates to preserve, among other things, negotiation of procedures and appropriate arrangements related to the terms identified in subsection (a). Thus, the terms of section 7106 indicate that an obligation to bargain over procedures and appropriate arrangements apply to §7106(a)(2)(D) as well as the other portions of subsection (a).

Assuming *arguendo,* the suspension of the parties' CBA was a true emergency, requiring impact and implementation bargaining as discussed above is warranted to reconcile the rights of the exclusive representative to bargain over changes in conditions of employment.

Since the Respondent determined and steadfastly refused to negotiate the impact and implementation of its decision to suspend the parties' CBA, I find that it has violated §§ 7106(a)(1), (5), and (8) of the Statute and Section 220 of the CAA.

Conclusions of Law

1. Respondent is an "employing office" within the meaning of CAA §§ 101(a)(9)(D) and 220(a)(1) and is the employing office which employs the bargaining unit employees.

2. Respondent committed an unfair labor practice in violation of CAA § 220(a) and 5 U.S.C. §§ 7116(a)(1) (5), and (8) when it suspended the parties' entire CBA without permitting any bargaining with the FOP or explaining why such action was necessary to carry out the agency's mission during the COVID-19 pandemic.
3. Respondent committed an unfair labor practice in violation of 5 U.S.C. §§ 7116(a)(1), (5), and (8) when it refused to reinstate provisions of the parties' CBA that did not interfere with carrying out its mission during the Covid-19 pandemic.
4. The Respondent committed an unfair labor practice in violation of 5 U.S.C. §§ 7116(a)(1), (5), and (8) when it refused to engage in any. bargaining with the FOP over changes to conditions of employment that it unilaterally implemented after suspending the parties' CBA.
5. The Respondent committed an unfair labor practice in violation of 5. U.S.C. §§ 7116(a)(1) and (8), when it suspended and refused to reinstate the grievance and arbitration provisions contained in Article 32 of the parties' CBA, contrary to the orders issued in *United States Capitol Police and Fraternal Order of Police,* 15-LMR-02 (CA) (OCWR Board 9/25/2017) and *United States Capitol Police and Fraternal Order of Police,* 16-LMR-01 (CA) (OCWR Board 9/6/2017).

Accordingly, and particularly noting the above legal precedents and my rejection of the Respondent's principal arguments, I am granting the General Counsel's and the FOP's Motions for Summary Judgment and deny the Respondent's Cross-Motion for Summary Judgment.

Remedy

Having found that the Respondent engaged in certain unfair labor practices, I shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the CAA.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, United States Capitol Police, Washington, DC, its officers, agents, successors, and assigns, shall.

1. Cease and desist from
(a) Failing or refusing to bargain with the Fraternal Order of Police, the exclusive representative of bargaining unit employees, on the indefinite suspension of the parties' entire CBA.
(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Federal Service Labor-Management Statute, as applied by Section 220 of the CAA.
(c) Inviting bargaining unit employees to contact the USCP Chief of Police directly regarding matters that must be handled by the FOP as the bargaining unit employees' exclusive collective bargaining representative.

2. Take the following affirmative action necessary to effectuate the policies of the CAA.
(a) Reinstate the *status quo ante* and engage in substantive and or impact and implementation bargaining over the changes already implemented and all future changes in the terms and conditions of employment of bargaining unit employees.
(b) Rescind the indefinite suspension of the parties' CBA and reinstate all provisions that have been suspended.
(c) Notify and, upon request, afford the FOP an opportunity to bargain to the extent required by law and regulation concerning any change in terms and conditions of employment for bargaining unit employees.
(d) Upon request of the FOP, make whole any bargaining unit employee who suffered any adverse action based on the USCP's unilateral suspension of the parties' CBA.

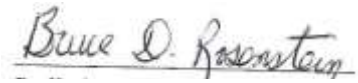
[8] If no exceptions are filed as provided by Sections 5.03(e) and 8.01 of the Procedural Rules of the Office of Congressional Workplace Rights, the findings, conclusions, and recommended Order shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service, post at its facilities in Washington, D.C. copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Office of Congressional Workplace Rights, after being signed by the Respondent's Chief Administrative Officer, shall be posted immediately upon receipt, and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their employees by such means. *Picini Flooring,* 356 NLRB 11 (2010) and *U.S. DOJ, FED. BOP, Transfer CTR., OKLA. City, OKLA.,* 67 FLRA 221 (2014). Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service, file with the Office of Congressional Workplace Rights a sworn certification of a responsible official attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 29, 2021



Bruce D. Rosenstein

Hearing Officer

[9] If this Order is enforced by a Judgment of the United States Court of Appeals for the Federal Circuit, the words in the notice reading "POSTED BY ORDER OF THE Office of Congressional Workplace Rights shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS for the Federal Circuit ENFORCING AN ORDER of the Office of Congressional Workplace Rights

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
Office of Congressional Workplace Rights
An Agency of the United States Government

The Office of Congressional Workplace Rights has found that we violated the Congressional Accountability Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain with us on your behalf.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

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

WE WILL rescind the indefinite suspension of the parties' CBA and reinstate all provisions that have been suspended.

WE WILL NOT invite bargaining unit employees to contact the USCP Chief of Police Directly regarding matters that must be handled by the FOP as the bargaining unit employees' exclusive collective bargaining representative.

WE WILL engage in substantive and or impact and implementation bargaining over changes made by the USCP when it unilaterally suspended in its entirety our CBA.

WE WILL, upon request of the FOP, make whole any bargaining unit employee who suffered any adverse action based on the USCPs unilateral suspension of the parties' CBA.

United States Capitol Police
Employer

Dated _____ By _____

Representative Title