UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: October 20, 2010

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION

RESPONDENT

AND Case No. CH-CA-10-0091

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 1395, AFL-CIO

CHARGING PARTY

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs and motions filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

SOCIAL SECURITY ADMINISTRATION RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1395, AFL-CIO CHARGING PARTY	Case No. CH-CA-10-0091

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **NOVEMBER 22, 2010**, and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

RICHARD A. PEARSON
Administrative Law Judge

Dated: October 20, 2010
Washington, D.C.

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

SOCIAL SECURITY ADMINISTRATION RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1395, AFL-CIO CHARGING PARTY	Case No. CH-CA-10-0091

Susanne S. Matlin
For the General Counsel

Catherine M. Six
Eric Garcia
For the Respondent

Loretta Fleming
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

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

On November 17, 2009, the American Federation of Government Employees, Local 1395, AFL-CIO (the Union or the Charging Party) filed an unfair labor practice charge against the Social Security Administration (the Agency or the Respondent). After investigating the charges, the Regional Director of the Chicago Region of the Authority

issued a Complaint and Notice of Hearing on March 29, 2010, alleging that the Respondent had refused to proceed to arbitration on a grievance in violation of section 7116(a)(1) and (8) of the Statute. The Respondent filed its Answer to the Complaint on April 23, 2010, denying that it committed an unfair labor practice.

The General Counsel (GC) filed a Motion for Summary Judgment that the Respondent opposed. On May 18, 2010, I issued an order denying the motion.

A hearing was held in this matter on May 25, 2010, in Chicago, Illinois. All parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. G.C. Ex. 1(c). The American Federation of Government Employees, AFL-CIO (AFGE), is the certified collective bargaining representative of a nationwide unit of employees of the Respondent, and the Union is the agent of AFGE for the purpose of representing those unit employees assigned to Respondent's Region 5. *Id.* As relevant to this case, there was a National Agreement between AFGE and the Respondent that became effective on August 15, 2005, and which, in Article 25, provided for the referral of unresolved grievances to arbitration. Resp. Ex. 1. AFGE and the Respondent also entered into a "Side Bar"

[1] After the hearing, the GC filed a Motion to Correct the Transcript, which the Respondent did not oppose. Upon my own review of the transcript, I grant the GC's motion, except with respect to page 31. Accordingly, the transcript is hereby corrected as follows:

P.12, l.25 is changed from "Cortsmith (ph.)" to "Portsmouth";
P.14, l.1 is changed from "—" to "Canteen";
P.14, l.22 is changed from "essence" to "sense";
P.15, l.5 is changed from "part of the hearing" to "at the prehearing";
P.18, l.24 is changed from "eligibility" to "arbitrability";
P.23, l.21 is changed from "in the tele-service" to "and the teleservice";
P.100, l.3 is changed from "exclusively" to "exactly".

agreement with respect to Article 25 that, among other things, established time limits for specified actions pertaining to arbitration and provided that if the time limits were not met, the grievance involved was "withdrawn."[2] Resp. Ex. 2.

In February 2008, the Union filed a grievance on behalf of employee Denise Canfield. Tr. 24; G.C. Ex. 2. The grievance was not resolved, and by memorandum dated June 30, 2008, the Union invoked arbitration. Tr. 25; G.C. Ex. 3. By memorandum dated July 2, 2008, the Union requested that an arbitrator be assigned. Tr. 26; G.C. Exh. 4. When a significant period of time went by and the Union representative handling the Canfield grievance, Charlotte Lewis, heard nothing regarding the assignment of the arbitrator, she sent an email dated March 12, 2009, to the Union's arbitration committee chair, Stanley Birnbaum, to inquire about the status of the case. Tr. 27-28; G.C. Ex. 5. By email of the same date, Birnbaum responded that arbitrator Steven Rutzick had been assigned on July 16, 2008. G.C. Ex. 5.

By emails dated March 17 and 20, 2009, Lewis asked the Agency to provide her with contact information for the Agency representative assigned to the Canfield case, and was advised that the representative was Mary Thorson. G.C. Ex. 6. Lewis testified she tried

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[2] The Side Bar agreement (Resp. Ex. 2) provides, in relevant part:

> The Parties agree to the following sunset provisions for arbitration:
>
> . . .
>
> - Invocations after the effective date of the new agreement-1 year to schedule from the assignment of the arbitrator and heard within 1 year thereafter or grievance is withdrawn.
>
> The timeframes are not applicable if the parties mutually agreed to extend the timeframes or due to circumstances beyond the parties' control (i.e., illness of the arbitrator, weather-related problems).
>
> If a hearing is delayed by:
>
> a. the Agency's failure to participate in the timely scheduling of the hearing, the Union may proceed in accordance with Section 4 of Article 25 with an additional six months to do so.
> b. the Agency's failure to present its case on the scheduled date, the parties agree that the case will be rescheduled and heard within one year.

Section 4 of Article 25 (Resp. Ex. 1) provides:

> Should either party refuse to participate in arbitration, the other party may present the case to the next arbitrator in the rotation, who shall have authority to render a decision.

unsuccessfully to contact Thorson by telephone twice, once in late March when she left no message and once in late April when she left a voice mail message consisting of her name and telephone number and few, if any, other details. Tr. 34-36, 65-66. Lewis heard nothing from Thorson, and her next attempt to reach Thorson consisted of an email dated June 29, 2009, in which she informed Thorson she wanted to coordinate dates for the arbitration in the Canfield case. Tr. 37, 66; G.C. Ex. 7. In response to her June 29 email, Lewis received an "out of office" response identifying two individuals who could be contacted for assistance during Thorson's absence. G.C. Ex 7 at 2. On or about July 6 or 7, Lewis telephoned David Skidmore, one of the alternative contacts for Thorson, and left a message for him to call her. Tr. 39-40. Lewis was then out of the office for a period, and when she returned on July 22 there was a message awaiting her that Skidmore had returned her call. Tr. 43-44. Lewis called Skidmore and learned that Thorson's absence was being extended because of medical reasons and her case load might have to be reassigned. Tr. 44-45. During this telephone conversation, Lewis made known to Skidmore that she was trying to schedule the Canfield case for hearing. Tr. 45. Lewis sent an email dated July 23, 2009, to Skidmore that she characterized as confirming her discussion with him. G.C. Ex. 8.

By email dated July 27, Lewis was contacted by Michael Feinstein, who identified himself as the person covering Thorson's workload until her return to the office, which was expected to occur by the end of August. G.C. Ex. 9. An email exchange between Lewis and Feinstein followed in which they discussed the possibility of settlement negotiations regarding the Canfield grievance. G.C. Ex. 9, 10.

In an email dated August 11, 2009, Ruth Bless, a Team Leader in the Agency's Labor and Employee Relations office informed Lewis that because an arbitrator had been assigned to the Canfield case on July 16, 2008, and no hearing was yet scheduled, the case had "sunset and the grievance has been closed." G.C. Ex. 11. According to Lewis's unrebutted testimony, she had an exchange of emails with Bless in which she disagreed with Bless's view regarding the continued existence of the grievance. Tr. 51-52.

In early September 2009, Lewis renewed email communication with Thorson, who had returned to the office, requesting to discuss possible dates for the arbitration hearing. Tr. 53-54; G.C. Ex. 12. Thorson responded by email dated September 10, 2009, asserting that pursuant to the Side Bar agreement to Article 25, scheduling of the arbitration hearing should have occurred by July 16, 2009, and because it didn't the grievance was withdrawn. G.C. Ex. 13. Lewis responded, contending that in view of her efforts prior to July 16 to schedule a date for the arbitration hearing, she did not agree the case had "sunset." G.C. Ex. 14. When Thorson refused to change her position, Lewis emailed Donna Calvert, whom she identified as either the director or deputy director of the Office of General Counsel at the

Agency, and sought her assistance in scheduling a hearing. Tr. 57; G.C. Ex. 16. Calvert, however, supported Thorson's position that the arbitration hearing in the Canfield grievance had not been timely scheduled. G.C. Ex. 17, 19.

Lewis's next step was to contact Steven Rutzick, the arbitrator assigned to the Canfield grievance, by email dated October 1, 2009, and request a list of dates on which he would be available to conduct the hearing. G.C. Ex. 20. Rutzick responded, providing a list of possible hearing dates. *Id.* Lewis then emailed Thorson, informing her of the contact with Rutzick and asserting that although the Union believed the arbitrability of the case was not in question, any threshold issue could be decided at the onset of the hearing. G.C. Ex. 21. Lewis then contacted Rutzick and informed him that although she wanted to set a hearing date, the Agency was refusing to participate. G.C. Ex. 22. Lewis sent a copy of this email to Thorson. *Id.*

Lewis testified that following this email to Rutzick she had a telephone conversation with Thorson, in which they went "back and forth about the merits of the case[.]" Lewis took the position that "we should be able to let the arbitrator decide whether or not there is an issue of timeliness," while she described Thorson's position as that "she didn't agree and that she was drafting a letter in response to the arguments that I have raised and basically to reaffirm the Agency's position." Tr. 64. Lewis never received a letter from Thorson, and the Union did not take any further action to schedule the arbitration. Tr. 65, 79-80.

The Side Bar agreement to Article 25, which lies at the heart of the Agency's defense in this case, originated in conjunction with the negotiations on a National Agreement between the Agency and AFGE that became effective in August 2005. Tr. 88-90; 104-06. Both an Agency witness, Ralph Patinella, and a Union witness, Agatha Joseph, who were involved in the negotiation of that Side Bar agreement, testified that it was negotiated in response to the existence of a backlog of grievances, some of which had been pending arbitration for a considerable period of time -- over 25 years according to Patinella and "maybe 10 years or more" according to Joseph. Tr. 90, 106. According to Patinella, the Agency's intent in seeking what became the Side Bar agreement was to establish a limit on the length of time a grievance could continue to exist without going through an arbitration hearing. Tr. 90. Joseph portrayed the Side Bar as an effort to reduce the number of grievances pending arbitration as well as move cases "through the pipeline." Tr. 105-06. Patinella characterized the Side Bar as a "sunset" provision and asserted the parties understood the phrase "or the grievance is withdrawn" to mean that the grievance was "gone" and arbitration was effectively waived. Tr. 90, 92-93. Joseph did not provide any testimony regarding the parties' understanding of the effect a failure to meet the time frames established in the Side Bar agreement would have on the continued viability of the grievance or arbitration.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The GC alleges the Respondent failed to proceed to arbitration on the Canfield grievance as it was required to do under the Statute and, consequently, violated section 7116(a)(1) and (8) of the Statute.

The GC argues that pursuant to section 7121 of the Statute, questions of abitrability must be submitted to an arbitrator for resolution, unless the parties to the collective bargaining agreement involved mutually agree otherwise. *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 11 FLRA 456, 457 (1983)(*Navy, Portsmouth)*; *U.S. Environmental Protection Agency, Region IV, Atlanta, Ga.*, 5 FLRA 277, 279 (1981). The GC contends that the issue of whether the Union timely pursued arbitration of the Canfield grievance is one of procedural arbitrability: under the Statute, parties are not permitted to unilaterally decide such issues, but rather they must submit them to an arbitrator for resolution.

The GC disputes the Respondent's claim that there was no statutory violation because (1) it cooperated in the arbitration proceedings until the point at which it contends the grievance ceased to exist, and (2) the Union could have proceeded to arbitration *ex parte*. With respect to the first point, the GC argues that the Agency's statutory obligations under section 7121 are not satisfied by partial cooperation in the arbitration process; rather, it must cooperate through the arbitration hearing itself. With respect to the second point, the GC contends that under the Statute both parties are required to proceed to arbitration on arbitrability questions, regardless of whether either party has the option of proceeding *ex parte*.

As a remedy, the GC seeks an order requiring the Respondent to proceed to arbitration in the Canfield grievance and post a notice to employees.

Respondent

The Respondent contends that it had no obligation to participate in the arbitration hearing, because the grievance had been withdrawn by operation of the Side Bar agreement. In support of this contention, the Respondent submits that the Union's failure to schedule the arbitration hearing in the Canfield grievance within the time limit established by the Side Bar agreement resulted in the automatic withdrawal of the grievance. The Respondent maintains that it participated in the arbitration process up until the grievance was withdrawn, but once withdrawal occurred, it had no obligation to participate further. The Respondent also asserts

that, in any event, its failure to participate in the arbitration hearing did not hinder the arbitration process, because the Union retained the ability to schedule and hold the arbitration hearing unilaterally.

While the Respondent acknowledges there is case law requiring parties to submit questions of arbitrability to arbitration, it argues that case law is not applicable in circumstances where the grievance involved has been withdrawn. Relying on the use of the term "withdrawn" rather than "non-arbitrable" in the Side Bar, the Respondent argues that the grievance ceased to exist, and accordingly it had no duty to process it further. The Respondent asserts that the Union waived any right it had to pursue arbitration of the Canfield grievance, both by its agreement to the Side Bar language regarding "withdrawal" and by its failure to meet the time limits specified in the Side Bar for scheduling the hearing. The Respondent maintains that the waiver is clear under the terms of the Side Bar agreement, and that both parties negotiating it understood that failure to meet the established timeframes would mean the grievance was withdrawn and arbitration waived.

The Respondent also argues that requiring it to go to arbitration on a case that has been withdrawn, or has "sunset," would defeat the purpose of that agreement and be a waste of government funds. The high cost of arbitrations was a significant reason for negotiating the Side Bar, and in order to effectuate the agreement, the delaying party must lose the right to even have a hearing.

Analysis

Section 7121(a) of the Statute requires that collective bargaining agreements contain "procedures for the settlement of grievances, including questions of arbitrability." Section 7121(b)(1)(C)(iii) requires all negotiated grievance procedures to include procedures that "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency." Virtually from its inception, the Authority has interpreted these provisions as requiring all questions of arbitrability not otherwise resolved to be submitted to arbitration. *See, e.g., Interpretation and Guidance,* 2 FLRA 274, 278-79 n.7 (1979). Moreover, since its decision in *Dep't of Labor, Employment Standards Admin./Wage and Hour Div., Washington, D.C.*, 10 FLRA 316 (1982)*(Labor, ESA*), the Authority has repeatedly held that a party refusing to participate in procedures for the resolution of grievances, including questions of arbitrability, violates section 7116(a)(1) and (8) of the Statute. *See, e.g., Dep't of the Air Force, Langley AFB, Hampton, Va.*, 39 FLRA 966, 969 (1991)(*Langley AFB*).

With one exception not relevant here,[3] the Authority consistently has rejected attempts by parties to carve out exclusions from the rule that parties must submit all questions of arbitrability to arbitration and participate in the arbitration proceedings. *See, e.g, Langley AFB*, 39 FLRA at 969; *Navy, Portsmouth*, 11 FLRA at 456-57. In applying this rule, the Authority has rejected arguments that a matter is so clearly nonarbitrable that it would be a waste of everyone's time and money to arbitrate a grievance; to the contrary, the Authority has said that a refusal to proceed to arbitration may not be justified by a party's contention, "however arguable or reasonable, that the parties intended . . . the grievance to be excluded from the coverage of the . . . arbitration procedures." *Langley AFB*, 39 FLRA at 969. Moreover, it is error for an Administrative Law Judge to usurp the role of the arbitrator and resolve a question of arbitrability. *See Navy, Portsmouth*, 11 FLRA at 457.

In this case, the question of whether the Canfield grievance was, as the Agency claims, effectively withdrawn as a consequence of the arbitration hearing not being scheduled in the prescribed time is one of procedural arbitrability that should be resolved by the arbitrator. *See Labor, ESA*, 10 FLRA at 321 (dispute over whether the request for arbitration was untimely was an arbitrability question that could properly be placed before an arbitrator); *see also Harry S. Truman Memorial Veterans Hospital, Columbia, Mo.*, 6 FLRA 565 (1981)(*Harry Truman Hospital*). That is, consistent with the general rule described above, and under section 7121 of the Statute, the effect of the Union's actions in pursuing the Canfield grievance was an arbitrability question that should be submitted to arbitration, regardless of how reasonable or obvious the Agency's position may seem. *See Navy, Portsmouth*. The use of the word "withdrawn" does not convey an automatic presumption of nonarbitrability. For instance, in *Harry Truman Hospital*, 6 FLRA at 566-67, an arbitrator held that the agency was entitled to pursue a grievance to a hearing even after the union had withdrawn it, and the Authority held that the arbitrator acted properly in doing so.

The evidence establishes that the Agency initially participated in the Union's efforts to arrange for arbitration of the Canfield grievance. There came a point, however, when the Agency took the position that the grievance had been withdrawn. This generated a debate between the Agency and the Union over who was at fault for the delay in scheduling the arbitration hearing, and the consequences of the delay under the Side Bar agreement. Although no Agency representative stated, in so many words, that they refused to schedule or participate in an arbitration hearing, it is clear from the Agency's communications with Ms. Lewis beginning in August 2009 that it considered the grievance "closed" and that it

[3] That exception involves matters that are excluded from arbitration by statute. *See Director of Admin., Headquarters, U.S. Air Force*, 17 FLRA 372 (1985), involving the termination of a probationary employee, and *Veterans Admin. Central Office, Washington, D.C.*, 27 FLRA 835 (1987), involving an adverse action against a Title 38 nurse. In the former decision, the Authority stated that the "case presents no threshold question or any other question of interpretation or statutory construction which can legitimately be resolved by an arbitrator." 17 FLRA at 375.

would take no further action to resolve the matter. G.C. Ex. 11, 13, 15, 17, 19. The Union offered to have the arbitrator decide the arbitrability issue as a threshold matter (G.C. Ex. 22, 23), but the Agency failed to respond to that offer. The Respondent does not deny that it refused to arbitrate: indeed, it argues in its pleadings that it "had no obligation to participate in the arbitration" and that "it would be improper for the agency to submit the issue of whether the grievance was withdrawn to an arbitrator as that would defeat the intent of the agreement." Resp. Post-Hearing Brief at 9.

In its defense, the Respondent essentially argues that the terms of the Side Bar permitted the action it took in refusing to participate further in the arbitration of the Canfield grievance once the deadline for holding an arbitration hearing passed. In this regard, the Respondent asserts that when the terms of the Side Bar are applied, the Union's failure to timely schedule a hearing constituted a waiver of its right to take the Canfield grievance to hearing. In *Internal Revenue Serv., Washington, D.C.*, 47 FLRA 1091 (1993)(*IRS*), the Authority adopted a framework for resolving unfair labor practices in which the "underlying dispute is governed by the interpretation and application of specific provisions of the parties' collective bargaining agreement[.]" 47 FLRA at 1103. In *IRS*, the Authority stated that when a respondent claims that a specific provision of the collective bargaining agreement permits its actions alleged to constitute an unfair labor practice, the Authority, and its Administrative Law Judges, will determine the meaning of the parties' collective bargaining agreement and resolve the unfair labor practice complaint accordingly. *Id.* The Authority further stated in *IRS* that, in such cases, once the General Counsel makes a *prima facie* showing that a respondent's actions violate the Statute, the respondent may rebut the GC's showing by establishing by a preponderance of the evidence that the collective bargaining agreement allowed the respondent's actions. *Id.* at 1110. Further, we apply "the same standards and principles in interpreting collective bargaining agreements as applied by arbitrators in both the Federal and private sectors and the Federal courts . . . ." *Id.* at 1110-11.

I find that the GC has made a *prima facie* showing that the Respondent unlawfully refused to participate in arbitration of the Canfield grievance, which would have included the question of the arbitrability of the grievance. As discussed above, the record as a whole shows the Agency rebuffed efforts the Union made with respect to submitting the grievance, including the arbitrability question, to arbitration. Also, as discussed above, parties are generally required to submit unresolved arbitrability questions to arbitration. The Respondent's actions thus violated the Statute, unless the Respondent can demonstrate that the collective bargaining agreement permitted it to do so.

In asserting that the Side Bar to Article 25 permitted its refusal to proceed to arbitration, the Respondent cites what it characterizes as the "clear language" of the Side Bar and testimony regarding the bargaining history of that provision. While the Side Bar may be clear in stating that a grievance is withdrawn if it is not scheduled within a year of the

assignment of the arbitrator, it also gives the Union additional time if the delay is due to the "Agency's failure to participate in the timely scheduling of the hearing[.]" Resp. Ex. 2. Ms. Lewis argued that Agency officials contributed to the delay by failing to answer her messages and requests for hearing dates in a timely manner. G.C. Ex. 14, 16, 18. The parties disagreed as to whether the grievance remained timely, but the Side Bar itself offers no clue as to how a timeliness dispute such as this should be resolved. Or, to phrase it in terms of the Respondent's argument, the Side Bar does not describe the consequences of the alleged withdrawal of a grievance. Neither explicitly nor implicitly does it provide that the Agency may unilaterally cease participating in a grievance it believes to have been withdrawn. In other words, while the Side Bar agreement sets out a one-year time limit for scheduling an arbitration hearing, it does not provide a means of resolving a timeliness dispute. Instead, it is Article 25 itself, and section 7121 of the Statute, which establish arbitration as the means of resolving such a dispute.

Accordingly, while the Side Bar to Article 25 provides the Agency a basis for arguing that the grievance is no longer arbitrable, it does not provide a basis for distinguishing such an arbitrability issue from any other arbitrability dispute that might arise. Nothing in Mr. Patinella's testimony sheds any light on the actual intent of the negotiating parties concerning how a dispute regarding the application of the Side Bar's time deadlines would be resolved. While Patinella testified that the Union negotiators agreed with his interpretation of the term "withdrawn," his conclusion was not supported in any way, either from the contents of the agreement or any extrinsic evidence. The Agency has provided no evidence, let alone a preponderance of the evidence, to establish that the collective bargaining agreement allowed it to refuse to arbitrate the Canfield grievance.

My review of the contractual language in the above paragraphs is not intended as a comment in any way on the merits of either party's position as to whether the Canfield grievance is arbitrable. That issue is not before me, and indeed it can only be resolved by the arbitrator chosen by the parties. Even if the Agency is correct in its interpretation of the Side Bar language, it offers no mechanism for resolving the disputed language other than unilateral refusal to participate further. That is not a method of resolution, but instead an imposition of fiat. This is incompatible with the language of section 7121 of the Statute and its case law. Moreover, the evidence does not demonstrate that the parties' dispute over the meaning of the term "withdrawn" is any different from other disputes in interpreting collective bargaining agreements. Frequently, each party considers its own reading of the agreement to be "clear" or "obvious," and feels that a drawn-out arbitration process will be needlessly expensive. But it is by means of arbitration that the Statute requires parties to resolve their disputes, including disputes over arbitrability. The only proper method for the Agency to pursue its understanding of the "sunset" rules of the Side Bar agreement is to argue before the chosen arbitrator that the grievance is no longer arbitrable. This is equally true, regardless of whether the dispute is over subject matter arbitrability or procedural arbitrability.

Finally, it is irrelevant that the Union could have proceeded to arbitration even without the Respondent. Since its decision in *Labor, ESA*, 10 FLRA at 320-21, the Authority has consistently held that a party's refusal to participate in the procedures for settlement of grievances violates section 7116(a)(1) and (8), even if the other party had the right to proceed to arbitration *ex parte*.

For all of these reasons, I find the Respondent refused to proceed to arbitration concerning the Canfield grievance, and thereby violated section 7116(a)(1) and (8) of the Statute.

Accordingly, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Social Security Administration (the Respondent) shall:

1. Cease and desist from:

(a) Failing or refusing to proceed to arbitration concerning the grievance filed by the American Federation of Government Employees, Local 1395, AFL-CIO (the Union) on behalf of Denise Canfield.

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

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

(a) Upon request of the Union, proceed to arbitration concerning the grievance filed on behalf of Denise Canfield.

(b) Post at its facilities throughout the Social Security Administration Great Lakes Region, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, Social Security Administration, Region 5, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., October 20, 2010.

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Social Security Administration violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to proceed to arbitration concerning the grievance filed by the American Federation of Government Employees, Local 1395, AFL-CIO, on behalf of Denise Canfield.

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

WE WILL proceed to arbitration concerning the grievance filed by the American Federation of Government Employees, Local 1395, AFL-CIO, on behalf of Denise Canfield.

_____
(Agency/Activity)

Dated: _____ By:_____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, whose address is: 55 W. Monroe Street, Suite 1150, Chicago, IL 60603, and whose telephone number is: (312)886-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. CH-CA-10-0091, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT — **CERTIFIED NOS:**

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_____
Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: October 20, 2010
Washington, DC