National Weather Service
Employees Organization

Dr. Louis Uccellini
Assistant Administrator for Weather Services and
Director, National Weather Service
1325 East West Hwy
Room 18130
Silver Spring, MD 20910

July 20, 2015

RE: Union grievance over termination of Memoranda of Understanding

Dear Dr. Uccellini:

This is a union grievance filed pursuant to Article 10, section 9 of the parties' collective bargaining agreement over your letter of July 16, 2015 in which management unilaterally terminated various side agreements and memorandum of understanding. Unlike the collective bargaining agreement, these agreements do not have a termination date. And, although the agency may seek to renegotiate or terminate these agreements by mutual agreement, it may not do so unilaterally.

The agency's claims that these agreements impermissibly interfere with management's rights are incorrect:

1. **Side Agreement on Temporary Promotions.** The FLRA has ruled repeatedly that collective bargaining provisions requiring a temporary promotion when management has assigned employees to perform higher graded duties are enforceable. E.g., *U.S. Dep't of the Navy, Naval Aviation Depot, Marine Corps Air Station, Cherry Point, NC*, 42 FLRA 795 (1991). Awards enforcing contract provisions requiring temporary promotions do not affect management's right to assign employees. *VA, Ralph H. Johnson Med. Ctr. and NAGE Local R5-136*, 56 FLRA 381, 386-87 (2000), *following remand*, 57 FLRA 72 (2001). Contract proposals that require management temporarily promote employees who perform higher graded work are within the duty to bargain. *NTEU Chapter 22,* 29 FLRA 348, 352-53 (1987). You are apparently unaware that ***the Federal Labor Relations Authority has already affirmed the enforceability of Arbitrator Simmelkjaer's arbitration award that you claim interferes with management's rights***. *National Weather Service and NWSEO,* 58 FLRA 490 (2003).

2. **MOU on Implementation of WSOM Chapter C-75.** To the extent that a restriction on the ability of the agency to use verification scores to evaluate employee performance interferes with management's rights, this agreement is an appropriate arrangement for employees who are adversely affected by the implementation by management of WSOM Chapter C-75. NWSEO also reserves the right to challenge the use of verification scores in any performance based action and notes that management has conceded in this MOU that "direct use of verification program scores is not considered suitable for individual performance appraisal purposes because objectively derived verification scores by themselves seldom fully measure the quality of a set of forecasts."

3. **MOU restricting involuntary reassignment of employees to the National Water Center.** We disagree that this MOU is no longer in effect. Further, we note that the Senate Appropriations Committee approved the reorganization of the Office of Hydrological Services into the National Water Center with the "understand[ing] that this realignment only affects vacant billets and current staff who are requesting to relocate to this new facility." See letter of Chairman Mikulski and Ranking Member Shelby to Secretary Pritzker, (September 15, 2014).

4. **MOU regarding space requirements for office space in SSMC-2.** You have failed to identify how the provisions of this MOU conflict with mandatory GSA regulations, or even which provisions of the GSA's regulations they conflict with. GSA regulations providing guidance to agencies on office space allocations do not preclude the negotiation of specific proposals allocating office space to unit employees. *NTEU and Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 43 FLRA 1442, 1449-52 (1992). Nor do such provisions conflict with management's right to establish its organization, as you contend. *National Treasury Employees Union, Chapter 83 and Dep't of Treasury, Internal Revenue Service*, 35 FLRA 398, 403-413 (1990).

5. **MOU regarding Health Club Subsidy.** We note that you do not contend that this MOU interferes with management's rights in any way, only that "the agency no longer wishes to use this approach to wellness." While this may serve as a basis for seeking to renegotiate this MOU, a party's desire to use a different approach is not a basis for unilateral termination of a contractual commitment.

6. **MOU on implementation of H1N1 Preparedness Plan.** This issue is already *res judicata.* Arbitrator Schick ruled that this memorandum does not violate appropriations law. The agency has filed exceptions to that award with the FLRA and will be bound by the FLRA's decision thereon. The decision of the Comptroller General is this matter is not binding on the National Weather Service. The Comptroller General and the Government Accountability Office (formerly, the General Accounting Office) are part of the legislative branch, and

its decisions are not binding on either executive agencies or the courts. *Ass'n of Civilian Technicians, Puerto Rico Chapter v. FLRA,* 269 F.3d 1112, 1116 (D.C. Cir. 2001); *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 201 n. 1 (D.C. Cir. 1994). The Comptroller General's decision in this matter was also *ultra vires*. "At the outset, it is important to set out GAO's jurisdiction. The Comptroller General may not overrule a specific arbitration award." *In the matter of Calculating Overtime Pay Rates for Government Printing Office Employees*, B-288992 (2003). "Under the statutes which govern federal labor-management relations, arbitration awards that may result from grievance proceedings are subject to review by the Federal Labor Relations Authority (FLRA) and not by this Office." *Matter of American Federation of Government Employees Local 2779* (B-235624 (1989). "[W]e will not otherwise issue a decision or comment on the merits of a matter which is subject to grievance procedures, if we find that it is more properly within the jurisdiction of the Federal Labor Relations Authority and that our assertion of jurisdiction would be disruptive to the grievance and arbitration process." *In Re National Federation of Federal Employees, Local 1437*, B-220119 (1985); accord, *In Re Cecil E. Riggs,* 71 Comp. Gen. 374 (1992); *Mr. Roger L. Elder, President, Columbia Basin Trades Council*, B-260902 (1995). "We are without jurisdiction to review or comment on the merits of the arbitration award in favor of the union in this case." *Matter of American Federation of Government Employees Local 916,* B-211954 (1983).

7. **Agreement and Understanding Between NWSEO and Department of Commerce of May 8, 2003.** This agreement was made in settlement of litigation rather than as part of routine collective bargaining. Nonetheless, it is a negotiable procedure under 5 U.S.C. section 7106(b)(2). To the extent that this agreement interferes with management's right to hire from appropriate sources, it is an appropriate arrangement under section 7116(b)(3) for employees adversely affected by management's direct hiring of general forecasters at lower grades rather than its own interns. There is no evidence that after 12 years this agreement has "excessively interfered" with management's rights.

Your letter of July 16, 2015 also constitutes an unfair labor practice in violation of 5 U.S.C. section 7116(a)(1) and (5) because it constitutes a repudiation of these valid agreements.

As relief, we demand that you rescind this letter and notify all unit employees that the NWS intends to continue to honor these seven agreements unless and until they are renegotiated with NWSEO. We further demand that you continue to honor these agreements and that you provide the following relief in the event that any employee suffers harm as a result of the agency's failure to continue to comply with these agreements. This includes:

a. Back pay for any unit employee who would be entitled to, and is denied, a temporary promotion under the terms of Arbitrator Simmelkjaer's decision interpreting the side agreement requiring temporary promotions;

b. Rescission of any PIP or performance based adverse action based on verification statistics, with back pay;

c. Restoration of any employee who is involuntarily reassigned in violation of the May 23, 2001 MOU, with back pay if the employee is reassigned to an area of lower locality pay;

d. Retroactive payment of any health club subsidy that is denied;

e. Vacating and re-advertisement of any general forecaster position that is not filled in accordance with the May 8, 2003 agreement and which is filled by a non-status hire, along with back pay to any eventual intern selectee.

f. The union's attorney fees in the event that any back pay is awarded pursuant to this grievance.

Sincerely,

Dan Sobien
NWSEO National President