

**BEFORE
EDWIN H. BENN
ARBITRATOR**

IN THE MATTER OF THE ARBITRATION

BETWEEN

**U.S. ENVIRONMENTAL
PROTECTION AGENCY
("AGENCY" OR "EPA")**

AND

**THE AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 704
("AFGE" OR "UNION")**

Arb. Ref.: 26.113

(14-Day Suspensions)

OPINION AND AWARD

APPEARANCES:

For the Agency: Agency refused to appear or participate.

For AFGE: Suzanne Summerlin, Esq.

Dates Briefs Received: July 27, 2026 (AFGE)

Agency Response Brief due August 11, 2026
not filed. Case placed in line for decision Au-
gust 14, 2026.

Date of Award: September 9, 2026

CONTENTS

SYNOPSIS	3
I. ISSUES	5
II. BACKGROUND AND FACTS	5
A. The Collective Bargaining Agreement	5
B. Executive Order 14,251	5
C. Termination of The Collective Bargaining Agreement And The Litigation	8
D. Grievants Sign A "Declaration of Dissent"	8
E. Grievants Are Disciplined	13
F. AFGE Grieves And Invokes Arbitration And The Agency Declines To Participate In The Grievance/Arbitration Procedures	14
G. Proceedings Before This Arbitrator	15
III. DISCUSSION	18
A. Are The Grievances Arbitrable?	18
1. The Private Sector Rule	19
2. The Federal Sector Rule	21
3. Retroactivity Of EO 14,251 And The Termination Of The MCBA	23
4. No Other Provisions Make This Dispute Not Arbitrable	29
5. Other Authority	36
6. Selection Of The Undersigned As The Arbitrator In This Case	38
7. Conclusion On Arbitrability	41
B. The Merits	41
1. Proceeding <i>Ex Parte</i>	41
2. The Standard And The Burden	42
3. Has The Agency Met Its Burden?	43
4. Other Arguments Made By AFGE	49
5. Conclusion On Whether Grievants Engaged In Misconduct	50
C. The Remedy	50
IV. AWARD	52

SYNOPSIS

Grievants are four Environmental Protection Agency ("EPA") employees with Federal service ranging between 11 and 37 years.

When this dispute arose, the American Federation of Government Employees ("AFGE") had a collective bargaining agreement ("MCBA") with EPA that covered Grievants.

Grievants (along with hundreds of other EPA employees), signed a "Declaration of Dissent" protesting actions of EPA which they asserted undermined public trust, ignored scientific consensus to benefit polluters, reversed EPA's progress in American's most vulnerable communities, dismantled EPA's Office of Research and Development and promoted a culture of fear, forcing staff to choose between their livelihood and well-being. Grievants signed the Declaration of Dissent in their personal capacity, on their time, and without Agency resources and their doing so did not interfere with their job duties.

The Declaration of Dissent was addressed to EPA Administrator Lee Zeldin with copies to members of Congress and several Congressional committees.

On July 3, 2025, EPA became aware that Grievants signed the Declaration of Dissent. Commencing on that same day, Grievants were put on administrative leaves and disciplinary procedures against them began.

On March 27, 2025, President Trump signed Executive Order ("EO") 14,251 (Exclusions From Federal Labor-Management Relations Programs) which declared that over 40 government agencies (including EPA) have as a primary function intelligence, counterintelligence, investigative, or national security work and removed statutorily created collective bargaining rights of employees working for those agencies (which affected hundreds of thousands of Federal employees). EO 14,251 instructed affected agency heads to terminate collective bargaining agreements with unions representing the agencies; terminate participation in any pending grievance proceedings, exceptions to arbitration awards or unfair labor practice proceedings which involve employees.

Litigation over the ability of President Trump through an executive order to cancel statutorily enacted collective bargaining laws immediately commenced. The courts have not yet resolved that question with finality.

EPA did not terminate its collective bargaining agreement with AFGE until August 8, 2025 – over four months after President Trump issued EO 14,251.

Commencing September 22, 2025, Grievants were notified that they were each suspended for 14 days for signing the Declaration of Dissent with EPA asserting that Grievants committed "Conduct Unbecoming of a Federal Employee".

AFGE filed grievances under the MCBA protesting the suspensions and invoked arbitration. EPA refused to participate in the grievance and arbitration process claiming that it would not do so because of EO 14,251. Under authority of Article

23, Section 2(G) of the MCBA ("... [i]f the non-invoking party refuses to participate in the selection of an arbitrator, then the invoking party is entitled to select the arbitrator ..."), AFGE designated the undersigned arbitrator from a provided list of arbitrators as the arbitrator for these grievances.

As an arbitrator, I do not have authority to confer jurisdiction upon myself. When EPA refused to participate in the arbitration process, I considered that refusal as a challenge to my jurisdiction – "arbitrability" – and established a briefing schedule, which AFGE complied with. Again, EPA did not participate.

This is not a default award. AFGE provided a detailed record of events and actions sufficient for me to decide this matter. Based on that record I make the following findings:

First, it is not necessary for me to pass upon the legality of EO 14,251 to resolve this case. The legality of EO 14,251 is for the courts. For purposes of this case, I have given EPA the benefit of the doubt that EO 14,251 allows President Trump to cancel collective bargaining rights of Federal employees and for the agencies, including EPA, to terminate their collective bargaining agreements.

Second, arbitration provisions in collective bargaining agreements survive termination of those agreements for disputes where the facts arose before termination of the agreements.

Third, the facts and commencement of the disciplinary process in this case occurred in July 2025 which pre-dated EPA's termination of the MCBA effective August 8, 2025. Under well-established law, the arbitration provisions in the MCBA therefore survived termination of that contract which EPA claimed it terminated under authority of EO 14,251. The grievances are therefore arbitrable.

Fourth, a reading of the Declaration of Dissent and Grievants signing that Declaration which was sent to members of Congress shows Grievants were engaging in specific protected rights *covered by the MCBA* including First Amendment rights, freedom of expression and petitioning Congress. EPA's issuance of discipline to Grievants for signing the Declaration of Dissent was discipline for engaging in that protected conduct and violated the relevant sections of the MCBA as well as rights emanating from the MCBA and did not promote the efficiency of the service as is required for valid discipline.

Fifth, based on the above and other reasons more fully discussed below, EPA therefore violated the MCBA by disciplining Grievants.

Sixth, as a remedy, the disciplinary actions issued to Grievants shall be rescinded; Grievants' records shall be expunged of all references to the suspensions issued to them and Grievants shall be made whole including receipt of backpay for lost compensation for the periods of suspension, with interest.

Seventh, under the circumstances, AFGE is entitled to reasonable attorney fees.

A full discussion now follows:

I. ISSUES

1. Are the grievances of [REDACTED] (collectively, "Grievants") arbitrable?

2. If the grievances are arbitrable, did the Agency prove by a preponderance of the evidence that Grievants engaged in misconduct, and, if that showing is made, that its imposed 14-day suspensions promote the efficiency of the service? If not, what should the remedy be?

II. BACKGROUND AND FACTS

A. The Collective Bargaining Agreement

There is a master collective bargaining agreement ("MCBA") between the parties covering the period June 14, 2024 to June 30, 2028.¹ The MCBA contains provisions governing discipline (Article 21), grievances (Article 22), arbitration (Article 23) and employee rights (Article 25).²

B. Executive Order 14,251

On March 27, 2025, President Trump signed Executive Order ("EO") 14,251, Exclusions From Federal Labor-Management Relations Programs which provides, in relevant part:³

Exclusions From Federal Labor-Management Relations Programs

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 7103(b)(1) of title 5 and 4103(b) of title 22, United States Code, to enhance the national security of the United States, it is hereby ordered:

¹ AFGE Exhibit 1.

² *Id.*

³ 90 Fed. Reg. 14553 (April 3, 2025).

<https://www.federalregister.gov/documents/2025/04/03/2025-05836/exclusions-from-federal-labor-management-relations-programs>

Section 1 . *Determinations.* (a) The agencies and agency subdivisions set forth in section 2 of this order are hereby determined to have as a primary function intelligence, counterintelligence, investigative, or national security work. It is also hereby determined that Chapter 71 of title 5, United States Code, cannot be applied to these agencies and agency subdivisions in a manner consistent with national security requirements and considerations.

(b) The agency subdivisions set forth in section 3 of this order are hereby determined to have as a primary function intelligence, counterintelligence, investigative, or national security work. It is also hereby determined that Subchapter X of Chapter 52 of title 22, United States Code, cannot be applied to these subdivisions in a manner consistent with national security requirements and considerations.

* * *

Sec. 6 . *Implementation.* With respect to employees in agencies or subdivisions thereof that were previously part of a bargaining unit but have been excepted under this order, each applicable agency head shall, upon termination of the applicable collective bargaining agreement:

* * *

(b) terminate agency participation in any pending grievance proceedings under section 7121 of title 5, United States Code, exceptions to arbitral awards under section 7122 of title 5, United States Code, or unfair labor practice proceedings under section 7118 of title 5 or section 4116 of title 22, United States Code, that involve such employees.

Chapter 71 of title 5, United States Code referenced in EO 14,251 is the Federal Service Labor-Management Relations Statute ("FSLMRS"), 5 U.S.C. §§ 7101 *et seq.*, adopted by Congress in 1978 as part of the Civil Service Reform Act.⁴ The FSLMRS at Section 7102 provides that for federal employees:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and

⁴ <https://uscode.house.gov/view.xhtml?path=/prelim@title5/part3/subpartF/chapter71&edition=prelim>

without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

Section 7103(b)(1) of the FSLMRS provides:

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

Beyond those agencies previously excluded from the FSLMRS, EO 14,251 excluded more than 40 agencies and agency subdivisions from FSLMRS coverage.⁵ EPA – the Agency in this case – was one of the agencies included in EO 14,251.⁶

⁵ <https://www.congress.gov/crs-product/LSB11367>

⁶ EO 14,251 at Section 2(b) 1-412.
AFGE estimates that over 950,000 federal employees lost collective bargaining rights as a result of EO 14,251.
<https://www.afge.org/article/summary-of-afge-lawsuits-against-trump--how-litigation-works-2/>

C. Termination of The Collective Bargaining Agreement And The Litigation

Relying upon EO 14,251, on August 8, 2025, the Agency terminated its collective bargaining agreement with AFGE.⁷

The affected unions covered by EO 14,251 (including AFGE) instituted litigation contesting the termination of their respective collective bargaining agreements. As of this writing, the president's ability to terminate those agreements through EO 14,251 has not been finally resolved.⁸

D. Grievants Sign A "Declaration of Dissent"

At the relevant time Grievants held positions with the Agency and were covered by the MCBA.

⁷ AFGE Exhibit 8; Agency email in this case dated June 30, 2026 ("On August 8, 2025, EPA terminated its collective bargaining agreement (CBA) with AFGE pursuant to Executive Order 14251 following the President's determination under 5 U.S.C. § 7103(b)(1)").

⁸ A summary of the legal proceedings can be found at:

<https://workerslegaldefense.org/litigation-tracker>
<https://www.afge.org/article/summary-of-afge-lawsuits-against-trump-how-litigation-works-2/>
<https://www.congress.gov/hrs-product/L/LSB11367>

Throughout, I have requested the parties to keep me updated on the status of the legal proceedings, specifically requesting whether any of the court actions enjoined this proceeding from going forward. See e.g., Scheduling Orders dated May 4, 2026 at 2, par. 6; June 29, 2026 at 5, par. 19; July 2, 2026 at 2, par. 6. According AFGE, this arbitration proceeding has not been prevented from moving forward by any of the court proceedings. AFGE Brief at 15.

⁹ AFGE Exhibit 12(a).
¹⁰ AFGE Exhibit 12(b).
¹¹ AFGE Exhibit 12(c).

On July 3, 2025 and prior to the Agency's August 8, 2025 termination of the MCBA, the Agency became aware that Grievants (along with over 600 other individuals including Agency employees, 387 anonymously) signed a "Declaration of Dissent" addressed to EPA Administrator Lee Zeldin with copies to the U.S. Senate Committee on Environment & Public Works, U.S. House Committee on Energy and Commerce, U.S. House Committee on Science, Space, and Technology, Members of Congress.¹³

The Declaration of Dissent stated:¹⁴

Declaration of Dissent

EPA employees join in solidarity with employees across the federal government in opposing this administration's policies, including those that undermine the EPA mission of protecting human health and the environment. Since the Agency's founding in 1970, EPA has accomplished this mission by leveraging science, funding, and expert staff in service to the American people. Today, we stand together in dissent against the current administration's focus on harmful deregulation, mischaracterization of previous EPA actions, and disregard for scientific expertise.

Since January 2025, federal workers across the country have been denigrated and dismissed based on false claims of waste, fraud, and abuse. Meanwhile, Americans have witnessed the unraveling of public health and environmental protections in the pursuit of political advantage. Today, we come directly to you, Administrator Zeldin and our elected officials, with the five concerns outlined below. We expect your deliberate consideration of these concerns and look forward to working with you to restore EPA's credibility as a premier scientific institution. Communities across

¹² AFGE Exhibit 12(d).

¹³ AFGE Exhibit 9(a)-(d) at 2, III(1) sent by the Agency for each Grievant ("On July 3, 2025, the Agency became aware that your name appeared on a document titled 'Declaration of Dissent' hosted on standupforscience.net").

¹⁴ AFGE Exhibit 5.

America are counting on you to lead EPA in carrying out its mission.

Our Shared Commitment to Protecting Human Health and the Environment

Administrator Zeldin, at your Senate confirmation hearing, you committed to leading EPA in its "simple but essential" mission. You expressed gratitude that President-elect Trump had given you the opportunity to "do everything in our power to harness the greatness of American innovation with the greatness of American conservation and environmental stewardship." You acknowledged the realities of climate change, the benefits of clean energy, the economic need for environmental justice, and the importance of protecting human health through smart regulation. Like you, EPA employees are committed to these principles. We call on you to reaffirm your testimony, honor your oath to the Constitution, and renew your commitment to become the environmental steward the public entrusted you to be.

Our Five Primary Concerns

Under your leadership, Administrator Zeldin, this administration is recklessly undermining the EPA mission, including in these five critical areas:

1. **Undermining public trust.** EPA's non-partisan nature ensures that all Americans—regardless of political affiliation—are served by an agency guided by scientific expertise, professional integrity, and an unwavering commitment to the public good. For over five decades, EPA's strength has come from its commitment to science-based decision-making. However, under this administration, the Agency's communication platforms have been used to promote misinformation and overtly partisan rhetoric. For example, EPA press releases and the "Call it a Comeback" newsletter have referred to EPA grants as "green slush funds" and praised "clean coal" as "beautiful." The Office of the Administrator has used official EPA channels to liken climate science to a religion, issue attacks against individual members of Congress, and criticize former presidents. These communications are partisan and scientifically unsound. The Office of the Administrator may have violated the Hatch Act by using EPA's official website and social media to promote political initiatives such as President Trump's tariffs and the so-called "Big Beautiful Bill." **This politicized messaging distracts from EPA's core**

responsibility: to protect human health and the environment through objective, science-based policy.

2. Ignoring scientific consensus to benefit polluters.

This administration's actions directly contradict EPA's own scientific assessments on human health risks, most notably regarding asbestos, mercury, and greenhouse gases. Health-based regulatory standards are being repealed or reconsidered, including drinking water limits for four PFAS "forever chemicals" that cause cancer. Under your leadership, Administrator Zeldin, EPA is promoting the fossil fuel-powered auto industry while simultaneously stripping away support for cleaner electric vehicles. You are supporting new technologies, such as artificial intelligence (AI), without addressing AI's intense consumption of environmental resources. The decisions of the current administration frequently contradict the peer-reviewed research and recommendations of Agency experts. Such contradiction undermines EPA's reputation as a trusted scientific authority. **Make no mistake: your actions endanger public health and erode scientific progress—not only in America—but around the world.**

3. Reversing EPA's progress in America's most vulnerable communities. Research overwhelmingly shows that the country's most vulnerable communities, including Black communities and other communities of color, poor communities, disabled communities, LGBTQIA+ communities, and historically overburdened and underserved rural and urban communities are consistently exposed to disproportionate environmental and climate burdens. EPA's environmental justice program—one that you have effectively dismantled—was addressing this disparity by funding states, cities, and communities all around the country through extensive grant programs and technical assistance. Now these same communities are the ones most at risk for losing federal funding. Since January 2025, EPA has placed the vast majority of environmental justice staff on administrative leave, canceled billions of grant dollars to communities, and removed a valuable mapping analysis tool that enabled EPA and others to work towards environmental equity. **Canceling environmental justice programs is not cutting waste; it is failing to serve the American people.**

4. **Dismantling the Office of Research and Development.** EPA's research provides the scientific basis for its rulemaking, stakeholder needs, and other key decisions. U.S. Law (42 U.S.C. § 4363) states that the EPA Administrator shall "establish a separately identified program of continuing, long-term environmental research and development," which is currently led by the Office of Research and Development, or ORD. Your administration has proposed a reorganization that moves EPA's foundational research to the Administrator's Office and reassigns ORD's research staff to the program offices. A move that places ORD scientists in regulatory program offices will make EPA science more vulnerable to political interference. In addition, the gutting of staff and science and your proposed budget cuts for the coming year will leave ORD unable to meet the science needs of the EPA and its partners and will threaten the health of all Americans.
5. **Promoting a culture of fear, forcing staff to choose between their livelihood and well-being.** OMB Director Russell Vought has stated that he wants EPA employees to be in a constant state of trauma and unable to do their jobs: "When they wake up in the morning, we want them to not want to go to work because they are increasingly viewed as the villains. We want their funding to be shut down so that the EPA can't do all of the rules against our energy industry [...] We want to put them in trauma." Administrator Zeldin, you have done your best to ensure that employees have no recourse against these assaults by nullifying bargaining agreements and refusing to negotiate. In addition, your administration has fired or forced onto administrative leave several categories of employees, including those responsible for environmental justice and those managing diversity, equity, inclusion, and accessibility (DEIA) initiatives. Your administration has also targeted probationary employees, including a range of students and recent graduates, whom U.S. District Judge William Alsup has called "the lifeblood of [the] government." Since January 2025, your administration has offered multiple rounds of resignation and retirement options. Of the employees who accepted your contractual agreements, few accepted without extenuating circumstances, such as immediate financial concern, fear of their position being eliminated, or concerns about changes to their retirement, among others.

These actions directly undermine EPA's capacity to fulfill its mission. We the undersigned call on you publicly today to honor your

responsibility to EPA and to the American people by advancing our mission of safeguarding human health and the environment.

Delivering on your duty to EPA and the public

Your decisions and actions will reverberate for generations to come. EPA under your leadership will not protect communities from hazardous chemicals and unsafe drinking water, but instead will increase risks to public health and safety.

Administrator Zeldin, we urge you to honor your oath and serve the American people.

Going forward, you have the opportunity to correct course. Should you choose to do so, we stand ready to support your efforts to fulfill EPA's mission.

Who We Are

This declaration was written and signed by EPA employees across Offices, Regions, and Labs in our personal capacity, on our own time, and without Agency resources. We are devoted to EPA's mission: to protect human health and the environment.

Administrator Zeldin, we share your stated goal of wanting every child in this nation, including your own, to "inherit a world with clean air, clean water, and a thriving economy." We are civil servants who are dedicated to responsibly managing public resources to drive innovative, high-impact research to create and implement the country's environmental regulations and solve environmental challenges. We want to work together, not to power the "Great American Comeback," but to launch America into a safer, healthier, and thriving future.

We sign this declaration both as concerned citizens and dedicated civil servants. In addition to the named signers, we include anonymous signers and speak for countless others at EPA who share our concerns, but who chose not to sign their names for fear of retaliation

E. Grievants Are Disciplined

Commencing July 3, 2025 (on dates prior to the Agency's August 8, 2025 termination of the MCBA), the Agency placed Grievants on administrative leaves.¹⁵

¹⁵ AFGE Exhibit 6. There were also leave extensions. *Id.*

On September 4, 2025, the Agency proposed 14-day suspensions for the four Grievants for "Conduct Unbecoming of a Federal Employee" with specifications:¹⁶

Specification 1: As part of an administrative investigation, you admitted that you signed a "Declaration of Dissent" posted to standupforscience.net. This Declaration included the language: "Today, we stand together in dissent against the current administration's focus on harmful deregulation, mischaracterization of previous EPA actions."

Specification 2: As part of an administrative investigation, you admitted that you signed a "Declaration of Dissent" posted to standupforscience.net. This Declaration included the language: "Meanwhile, Americans have witnessed the unraveling of public health and environmental protections in the pursuit of political advantage."

Specification 3: As part of an administrative investigation, you admitted that you signed a "Declaration of Dissent" posted to standupforscience.net. This Declaration included the following language, "this administration is recklessly undermining the EPA mission" and EPA's actions "endanger public health and erode scientific progress – not only in America – but around the world."

Grievants answered and protested the charges.¹⁷

On dates between September 22 and September 26, 2025, the Agency imposed the 14-day suspensions for each Grievant.¹⁸

F. AFGE Grieves And Invokes Arbitration And The Agency Declines To Participate In The Grievance/Arbitration Procedures

On dates between October 22 and October 24, 2025, AFGE grieved the suspensions and began the process through the grievance procedure in the MCBA with the

¹⁶ AFGE Exhibits 9(a)-(d).

¹⁷ AFGE Exhibits 10, 11.

¹⁸ AFGE Exhibit 12.

Agency responding that due to the Executive Orders it would not engage in any grievance procedures prescribed by collective bargaining agreements.¹⁹

On December 10, 2025, AFGE invoked arbitration on the four grievances.²⁰ The Agency declined to participate in the arbitrator selection process through the Federal Mediation and Conciliation Service ("FMCS") – "[d]ue to the Executive Orders, the Agency is not able to process grievances under the AFGE CBA ... [a]s a result, we are unable to move these matters forward through the AFGE grievance procedure."²¹

Relying upon the Article 23, Section 2(G) of the MCBA ("[i]f the non-invoking party refuses to participate in the selection of an arbitrator, then the invoking party is entitled to select the arbitrator from the FMCS list."), AFGE selected the undersigned as the arbitrator for this case.²² See discussion below at III(A)(6) concerning my serving as the arbitrator in this case.

G. Proceedings Before This Arbitrator

Throughout, the Agency has refused to participate in the grievance and arbitration process. After notification that I was selected as the arbitrator in this matter I issued scheduling orders on May 4, June 29 and July 2, 2026 setting the schedule for this proceeding at all times serving previously identified counsel for the Agency.

The May 4, 2026 Scheduling Order noted that there were two issues in dispute – arbitrability of the dispute and, if found arbitrable, the merits of the discipline.

¹⁹ AFGE Exhibits 2-4.

²⁰ AFGE Exhibit 13.

²¹ *Id.*

²² AFGE Exhibits 1, 13, 14; AFGE Brief at 6 ("The Union invoked arbitration on all four grievances on December 10, 2025 ... FMCS issued a panel on April 6, 2026 ... [w]hen the Agency declined to participate in striking the panel, the Union selected the Arbitrator pursuant to Article 23, Section 2, on April 8, 2026.").

Because the Agency refused to appear or participate, I determined that because my jurisdiction to decide this case was being challenged, arbitrability was an issue in this case.

A briefing schedule was established by that order setting June 1, 2026 for AFGE to address why the dispute is arbitrable; June 16, 2026 for the Agency to respond (with a request for a courtesy notification if the Agency chose to not respond which would not be taken as agreement that it was subject to the proceeding's jurisdiction); and a reply by AFGE by June 23, 2026. The order further provided that if I found the dispute to be arbitrable, a hearing on the merits would be held on July 14, 2026.

Although AFGE met its initial briefing obligation, the Agency did not file a brief or notify me that it was not going to file.

Based on what was presented, I determined that I did not have sufficient information to rule on the arbitrability issue (June 29, 2026 Supplemental Scheduling Order at 2-3, pars. 3-5, 9 [emphasis in original]):

3. The refusal of a party to participate in an arbitration proceeding under a collective bargaining agreement does not prevent that arbitration from moving forward. Nor does that refusal prevent an arbitrator from issuing an award.

4. However, the refusal of a party to participate in the arbitration process does not automatically entitle the non-refusing party to a default award sustaining a grievance. Even when a party refuses to participate, as an arbitrator, I still have an obligation to make a sufficiently complete record upon which to base my rulings.

5. Thus far, I find that I do not have sufficient *evidence* in this record to make all required rulings.

* * *

9. The Agency's refusal to participate thus far raises the issue of substantive arbitrability which, as a threshold matter, needs to

be resolved. I do not have authority to confer jurisdiction upon myself if no jurisdiction exists. To make the decision on substantive arbitrability I need more than I have received thus far.

Given the lack of sufficient evidence to address the arbitrability issue and the refusal of the Agency to participate, I modified the procedure to require a hearing on the issues on the previously scheduled July 14, 2026 hearing (*id.* at 4, pars. 14-15):

14. Given that I am presently unable to make a decision on arbitrability based on the evidence I currently have, in order to make a complete record it will be necessary for the record to be supplemented as discussed above in paragraphs 6-9 and that will occur at the upcoming July 14, 2026 hearing. The July 14, 2026 hearing will provide the parties the ability to present that evidence and further argument on the arbitrability issue as well as on the merits of the grievances.

15. The arbitrability issue will be addressed first at the July 14, 2026 hearing. Evidence concerning the merits of the grievances will also be considered. With respect to the merits (and assuming the dispute is found to be arbitrable), the burden is on the Agency to demonstrate through proof that the employees engaged in misconduct and, if that showing is made, that the level of discipline imposed was appropriate. If the dispute is arbitrable and the Agency does not meet its burden on the merits, the question then becomes what remedies are appropriate?

After issuance of the June 29, 2026 Supplemental Scheduling Order, the Agency did acknowledge receipt of that order with its June 30, 2026 email maintaining its earlier noted position that it would not participate in these proceedings;

Receipt confirmed.

EPA's position remains unchanged.

On August 8, 2025, EPA terminated its collective bargaining agreement (CBA) with AFGE pursuant to Executive Order 14251 following the President's determination under 5 U.S.C. § 7103(b)(1).

Consistent with that position, EPA is not participating in arbitration proceedings arising under CBAs terminated pursuant to Executive Order 14251, including the matter currently before you. EPA's position is that questions concerning the continued applicability of Chapter 71 of Title 5 are properly reserved for the FLRA and the federal courts to resolve.

* * *

The Agency preserves all rights with respect to jurisdiction and any further proceedings.

AFGE then requested that the hearing set for July 14, 2026 not be held and that the disputed issues be decided on a documentary record. I granted that request and a briefing schedule was established (Second Supplemental Scheduling Order dated July 2, 2026).

AFGE filed its opening brief on July 27, 2026 as directed, but the Agency did not respond by the August 11, 2026 due date established by the Second Supplemental Scheduling Order. On August 14, 2026, I then notified the parties by email that because the Agency did not file a response brief, there was no need for a reply brief from AFGE and as of that date "I will now consider the case in line for decision."

III. DISCUSSION

A. Are The Grievances Arbitrable?

The litigation over President Trump's ability to terminate agency collective bargaining agreements including the MCBA in this case is making its way through the court system. AFGE argues that "the outcome of the pending litigation over Executive Order 14251 does not control the arbitrability of these grievances."²³

I agree.

Obviously, if EO 14,251 is struck down by the courts (with finality) as allowing termination of the collective bargaining agreements, the MCBA was never lawfully

²³ AFGE Brief at 13.

terminated by the Agency and the grievances which were timely processed through the grievance procedure by AFGE are arbitrable. I leave that ultimate decision on the validity of cancellation of the collective bargaining agreements to the courts.

However, giving the Agency the benefit of the doubt and assuming for the sake of discussion that President Trump had the ability to lawfully issue EO 14,251 on March 27, 2025 with the result that the Agency could terminate the MCBA on August 8, 2025, the evidence shows that the facts in this case arose *prior* to the Agency's August 8, 2025 termination of the MCBA. As discussed above at II(D) and (E), on July 3, 2025 the Agency was aware that Grievants had signed the "Declaration of Dissent" which were the actions that the suspensions were issued to them. Moreover, Grievants were put on leave commencing July 3, 2025 and prior to the Agency's August 8, 2025 termination of the MCBA.

Assuming the validity of the Agency's termination of the MCBA on August 8, 2025 under authority of EO 14,251, the narrow question then becomes the often-litigated issue of whether the arbitration clause in a collective bargaining agreement survives termination or cancellation of that agreement?

1. The Private Sector Rule

In the private sector where parties are subject to jurisdiction of the National Labor Relations Act ("NLRA"), 29 U.S.C. Section 151, *et seq.*, grievances are presumptively arbitrable. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960) ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute ... [and d]oubts should be resolved in favor of coverage"); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 377 (1974) ("In the *Steelworkers* trilogy, this Court enunciated the now well-known

presumption of arbitrability for labor disputes" [footnote omitted]). In the private sector, the Supreme Court views arbitration as a contractual matter which is consensual. *Warrior & Gulf, supra*, 363 U.S. at 382 ("... arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

In the private sector, expiration or termination of collective bargaining agreements often raise the question of whether the arbitration provisions of the expired or terminated contract continue beyond the expiration or termination date. The Supreme Court addressed that question in *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 250-251 (1977) stating that "the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so" with the finding that "[a]dherence to these principles, however, does not require us to hold that termination of a collective-bargaining agreement automatically extinguishes a party's duty to arbitrate grievances *arising under the contract*" [emphasis added].

The Court's use of the phrase "arising under the contract" proved confusing. For example, employee rights might vest prior to the expiration or termination of a collective bargaining agreement, but disputes and grievances concerning those prior vested rights might not occur until actions are taken after the contract has expired or terminated.

In *Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190, 205-206 (1991) the Court clarified *Nolde's* "arising under the contract" language explaining that "[a] postexpiration grievance can be said to arise under the contract *only where it involves facts and occurrences that arose before expiration*, where an action taken after expiration infringes a right that accrued or vested under

the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement” [emphasis added].

If *Nolde* and *Litton* applied here, because the dispute “involves facts and occurrences that arose before expiration” the grievances would be clearly arbitrable because on July 3, 2025, the Agency became aware that Grievants previously signed the “Declaration of Dissent” and the Agency placed Grievants on leaves on dates prior to the August 8, 2025 termination of the MCBA. Under *Litton*, the dispute “involves facts and occurrences that arose before expiration” which means that under *Nolde*, the dispute was one “arising under the contract”.

But this is not a private sector case – this is a federal sector case.

2. The Federal Sector Rule

In the federal sector where this case arises, arbitration is not consensual, but is a matter of statute.

5 U.S.C. Section 7121 provides [emphasis added]:

§7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement *shall provide* procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall-

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that-

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) *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.*

The Federal Labor Relations Authority ("Authority") has adopted the rationale that arbitration provisions in collective bargaining agreements continue after the contracts expire. *Independent Union of Pension Employees and Justice and Pension Benefit Guarantee Corporation*, 68 FLRA 999, 1004 (2015) [footnote omitted, emphasis added]:

It is well established that *when a negotiated agreement expires*, personnel policies, practices, and matters affecting working conditions continue to the maximum extent possible absent either an express agreement to the contrary or the modification of those conditions of employment in a manner consistent with the Statute. *These continuing policies, practices, and matters encompass negotiated grievance and arbitration procedures.* And negotiated grievance and arbitration procedures include the selection of an arbitrator.

Distinguishing post-contract expiration or termination obligations to arbitrate in federal sector cases from those arising in the private sector under the NLRA and citing 5 U.S.C. § 7121(a)(1) and (b)(1)(iii) quoted above, the Authority found in *Pension Benefit Guarantee Corporation, supra*, 68 FLRA at 1005 [emphasis added]:

Unlike the NLRA, however, *the Statute, by its very language, creates an obligation by law to arbitrate unresolved grievances*. Congress, rather than making the decision to participate in arbitration voluntary or consensual, explicitly bound parties under the Statute and required binding arbitration. As such, *Litton* does not apply here and does not contradict Authority precedent.

See also, Department of the Air Force 35th Combat Support Air Group (TAC) George Air Force Base, California and National Federation of Federal Employees, Local 977, 4 FLRA 22 (No. 5), 23 (1980) [quoted in Pension Benefit Guarantee Corporation, supra at 1004, note 69] (“... working conditions – including negotiated grievance and arbitration procedures – must continue as established upon the expiration of a negotiated agreement”).

Therefore, AFGE is correct:²⁴

Assuming *arguendo* that the Agency is correct and that it was properly excluded from coverage of the Statute by executive action, this matter remains properly before the Arbitrator, because the duty to arbitrate attaches by force of the Statute rather than by consent. The federal sector duty to arbitrate is a statutory obligation, not a matter of continuing consent, 5 U.S.C. § 7121(a)(1), (b)(1)(C)(iii), and the Authority has squarely rejected the argument that private sector consent principles govern.

3. Retroactivity Of EO 14,251 And The Termination Of The MCBA

The analysis thus far shows the facts in this case occurred on July 3, 2025 when the Agency learned that Grievants signed the Declaration of Dissent and the Agency's disciplinary actions against Grievants commenced in July 2025 as Grievants were placed on leaves as the disciplinary process began. The MCBA was terminated on August 8, 2025 – after those events occurred. Those facts and the legal precedent therefore require a finding that the arbitration provisions of the MCBA survived

²⁴ AFGE Brief at 9-10.

termination of that contract. However, to give the Agency the benefit of the doubt, the analysis is proceeding under the assumption that EO 14,251 was lawful to allow termination of the MCBA – a question not yet finally determined by the courts.

But even if EO 14,251 was lawful to allow termination of the MCBA, EO 14,251 does not provide for retroactive application of termination of any collective bargaining agreements. Instead, the public record shows that the intent of EO 14,251 did not by itself terminate collective bargaining agreements on the effective date of issuance (March 27, 2025), but the intent was to have the covered federal agencies terminate collective bargaining agreements at some point *in the future after* issuance of EO 14,251.

On March 27, 2025 (the same day that EO 14,251 issued), the U.S. Office of Personnel Management (“OPM”) issued its Guidance on Executive Order from Federal Labor-Management Programs to the Heads and Acting Heads of Departments and Agencies which provided in pertinent part [footnote omitted, emphasis added]:²⁵

D. Discontinue Grievance Participation

In keeping with the provisions of the FSLMRS, CBAs provide for binding arbitration of union grievances, including disputes over whether personnel actions were justified. To implement Exclusions, agencies should cease participating in grievance procedures *after terminating their CBAs*. To the extent that covered agencies and subdivisions are litigating grievances before an arbitrator *when they terminate their CBAs*, they should discontinue participation in such proceedings *upon termination*. Agencies can and should compensate arbitrators for work performed prior to the termination of the CBA, but not for any work performed thereafter. Agencies should not participate in further grievance arbitration proceedings *following termination of their CBAs*.

²⁵

<https://perma.cc/QH4A-MQ9F>

Instructions from OPM to the federal agencies and subdivisions covered by EO 14,251 on procedures to follow “after terminating their CBAs ... when they terminate their CBAs ... upon termination [and] following termination of their CBAs” which issued simultaneously with EO 14,251 clearly show an intent that EO 14,251 by itself was not to immediately terminate the agencies’ collective bargaining agreements with their unions on the March 27, 2025 date of issuance of EO 14,251, but to have the agencies terminate those contracts at some point in the future and *not* retroactively.

The lack of retroactivity of EO 14,251 on termination of collective bargaining agreements with agencies covered by EO 14,251 is further clearly demonstrated by OPM’s memo to Heads of Departments and Agencies dated February 12, 2026 (revised February 17, 2026) advising the agencies that “[f]or various reasons, including litigation, implementation of these Executive Orders at certain agencies and agency subdivisions has been delayed ... [t]he U.S. Office of Personnel Management (OPM) now advises agencies and agency subdivisions covered by E.O. 14,251 and E.O. 14343 that *they should proceed to terminate or modify CBAs in order to fully comply with those Executive Orders*” [emphasis added].²⁶ OPM even attached a “template termination notice” for the agencies to send the applicable unions.²⁷ The template provides, in pertinent part [emphasis added]:²⁸

III. Agency Termination Notice

Effective the date of this Memorandum, the parties’ [insert CBA details, e.g., “September 9, 2022, Master Labor Agreement”] is terminated and no longer in effect except for those employees described in 1-499 of Section 2 of E.O. 14251. Those employees

²⁶ <https://www.opm.gov/chcoc/latest-memos/implementation-of-executive-orders-14251-and-14343.pdf>

²⁷ *Id.*

²⁸ *Id.*

excepted from coverage under E.O. 14251 and E.O. 14343 will continue to be represented by [insert name of certified representative] and subject to the terms of the parties' CBA.

OPM's instructions to the various agencies in February 2026 who had not yet terminated their collective bargaining agreements under authority of EO 14,251 that "*they should proceed to terminate or modify CBAs in order to fully comply with those Executive Orders*" and even providing a memo instructing the agencies to put in their notices to the unions to make those terminations "[e]ffective the date of this Memorandum" show no intended retroactive application of those terminations by EO 14,251. If EO 14,251 was intended to be effective to terminate the collective bargaining agreements when it issued on March 27, 2025 and to further be retroactive prior to that date, there would have been no need for OPM's instructions in February 2026 – over 11 months *after* EO 14,251 issued – to the various agencies who had not yet terminated their collective bargaining agreements to do so and to use a template providing that the collective bargaining agreements "[e]ffective the date of this Memorandum" which gave notice of the terminations.

Therefore, when the Agency terminated the MCBA in this case on August 8, 2025, it must be found that the Agency did not do so retroactively to EO 14,251's issuance on March 27, 2025.

The Agency's termination of the MCBA was effective August 8, 2025. The message sent to all Agency employees on August 20, 2025 stated the subject line as "Termination of Collective Bargaining Agreements (AFGE, NAGE R4, NAGE Narragansett, ESC, and NAIL) at EPA *Effective Aug. 8, 2025* advising that "[o]n Aug. 8, 2025, EPA terminated its collective bargaining agreements with all its unions" [emphasis added].

However, because the right of Grievants and AFGE to eventual arbitration occurred prior to August 8, 2025 when Grievants signed the Declaration of Dissent and the Agency disciplinary actions began prior to that termination date, that right to arbitration was not extinguished by the August 8, 2025 termination of the MCBA. Putting aside whether the Agency could lawfully terminate the MCBA (again, an issue to be decided by the courts and not this arbitrator) and giving the Agency the benefit of the doubt that it could terminate the MCBA, there is no showing that when the Agency terminated the MCBA on August 8, 2025 it did so under appropriate authority to make that termination retroactive to also terminate the rights to arbitration existing in this case.

Absent authorizing provisions which provide for retroactive application, statutes or agency actions do not apply retroactively. *See Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994):

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

See also, Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) [citations omitted]:

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. ... By the

same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. ... "The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words".

And with respect to effective dates and retroactivity of executive orders, see *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311 (D.C. Cir. 1984) where President Regan issued an executive order in July 1983 (Executive Order 12,434) which affirmed the Interstate Commerce Commission's final ratemaking authority over a railroad and provided that contract rates filed under a previous executive order (11,107) were to be governed by the terms of the new Order (12,434). Executive Order 12,434 clearly stated an intent for retroactive application.²⁹ The Court found (738 F.2d at 1314):

... [T]he question of whether a given law applies retroactively is one of statutory interpretation. The "law" at issue in this instance is an Executive Order promulgated by the President, and it is to his intent that we must turn for guidance in deciding the issue of retroactivity. ...

... The plain language of the Executive Order makes clear that the President intended it to have retroactive impact.

In *North American Foreign Trading Corp. v. United States*, 600 F.Supp. 226, 230 (Ct. International Trade, 1984) and applying *Sea-Land Service, supra*, the court

²⁹ EO 12,434 dated July 19, 1983 clearly made rates retroactive in Sections 2(d) and 4(b) of that order which provided "Alaska Railroad rates, rate arrangements, and contracts entered into pursuant to this Order and Executive Order No. 11107 of April 26, 1963 are subject to the actions of the Interstate Commerce Commission, pursuant to Section 3 of this Order ... Any existing Alaska Railroad rate entered into under Executive Order No. 11107 shall have the same force and effect as if it had been entered into in accordance with the provisions of this Order."

See The American Presidency Project:

<https://www.presidency.ucsb.edu/documents/executive-order-12434-alaska-railroad-rates>

observed “[o]nce Congress delegates authority to the President, it is the President’s intent alone which determines whether an executive order is to be retroactive.”

Assuming the validity of EO 14,251 for purposes of this discussion, nothing in EO 14,251 points to an intent for retroactive application of the termination of the MCBA which did not take effect until August 8, 2025. For reasons discussed, the intent of EO 14,251 is clearly prospective application – *i.e.*, for the agencies to take action in the future to terminate their collective bargaining agreements, which the Agency did not do until August 8, 2025.

4. No Other Provisions Make This Dispute Not Arbitrable

In the June 29, 2026 Supplemental Scheduling Order at 2, I noted that the refusal of the Agency to participate in the arbitration process did not prevent the proceeding from moving forward and issuance of an award, but also did not automatically entitle AFGE to a sustaining award. I found that “[e]ven when a party refuses to participate, as an arbitrator, I still have an obligation to make a sufficiently complete record upon which to base my rulings.”³⁰ I cannot render default awards that might clothe me with jurisdiction that I do not have.

After the Supplemental Scheduling Order, the arbitrability issue before me was briefed, but I found that “[t]hus far, I find that I do not have sufficient *evidence* in this record to make all required rulings” and:³¹

7. From what is before me, I do not know the alleged misconduct the employees engaged in which caused the suspensions. Moreover, I do not know the reasons for the Agency’s placing the employees on leave. Also, I have no evidence of responses directly from the Agency concerning the leaves, the discipline, or the grievances.

³⁰ *Id.* at 2, par. 4.

³¹ *Id.* at 2-3.

8. Such further evidence as described above is necessary for me to resolve the arbitrability issue in this case. What did the employees allegedly do? Aside from the Step 1 grievances (which the Step 2 grievances indicate were filed after the Agency terminated the MCBA), did the employees and/or the AFGE protest the Agency's actions prior to filing grievances at Step 1 and if so, when and in what form? Are there documents other than the Step 2 grievances that exist in this case relevant to answering those questions? Again, all I have are the Step 2 grievances.

With the supplemental briefing schedule ordered by the Supplemental Scheduling Order, the record is now sufficiently complete.

My concern was really focused on the alleged misconduct by Grievants – I asked in paragraph 8, “What did the employees allegedly do?” The reason for that concern was even if the arbitration provisions of the MCBA survived the August 8, 2025 termination, the arbitration provisions in the MCBA had specific areas of misconduct which, as a matter of contract, would make the grievances not arbitrable.

Article 22, Section 2 of the MCBA initially defines “[a] grievance”:

Section 2.

A grievance means any complaint:

- A. By any bargaining unit employee concerning any matter relating to the employment of the employee;
- B. By the Union concerning any matter relating to the employment of a bargaining unit employee; or
- C. By the Union or the Agency concerning:
 1. The effect or interpretation, or claim of breach of this Agreement, Supplemental Agreements or Memoranda of Understanding; or
 2. Any claimed violation, misinterpretation, or misapplication of law, rule, or regulation affecting conditions of employment.

In Article 23, Section 1(B) of the MCBA, the parties provided that “[o]nly the Union or the Agency may refer to arbitration any unresolved *grievance* after the final step of the negotiated grievance procedure” [emphasis added].

Given the definition of “grievance” in Article 22, Section 2 and the provision in Article 23, Section 1(B) that the parties “... may refer to arbitration any unresolved grievance ...”, the arbitration provisions at first appear quite broad.

But that is not quite the case.

Article 22, Section 3 of the MCBA carves out areas from coverage by the grievance procedure and therefore from arbitration making disputes over those areas not arbitrable:

Section 3.

In addition to any other exclusions contained in this Agreement, the grievance procedure will not apply to:

- A. Any claimed violation of Subchapter III of Chapter 73 of Title 5, U.S.C. (relating to prohibited political activities);
- B. Retirement (5 C.F.R. 831), life insurance (5 C.F.R. 870, 871, 872 and 873) or health insurance (5 C.F.R. 890);
- C. Any examination or certification (5 C.F.R. 332 and 337), or appointment, e.g., the separation of an employee during a probationary period (5 C.F.R. 2, 3, and 8);
- D. A suspension or removal under Section 7532 of Title 5 U.S.C. (Relating to national security matters);
- E. The classification of any position which does not result in a reduction in grade or pay of an employee (5 C.F.R. 511);
- F. A management decision to make or terminate a temporary promotion, detail, or reassignment;
- G. The adoption or non-adoption of a suggestion or the receipt or non-receipt of an honorary or cash award in accordance with the terms of this agreement;
- H. The mere non-renewal or extension of a temporary employee, termination of a temporary appointment due to

reduction in force, and any other termination of the appointment of a temporary employee in accordance with applicable policy, law and this Agreement;

- I. Separation of a term or trial employee in accordance with applicable policy, regulation, law, or this Agreement.

My concern that I expressed through the statement in the Supplemental Scheduling Order of "What did the employees allegedly do?" was focused on the carve-outs in the grievance and arbitration procedure for the areas the parties agreed in Article 22, Section 3 that "the grievance procedure will not apply to" thereby making the grievances not arbitrable even if the Agency refused to participate in this process. As I have indicated throughout, "I do not have authority to confer jurisdiction upon myself if no jurisdiction exists." If Grievants engaged in any the areas of conduct specified in Article 22, Section 3, I have no jurisdiction in this dispute as those areas are carved out from the grievance procedure making the grievances not arbitrable – without regard to whether the Agency participated in the arbitration process.

Now that I have a fully briefed record from AFGE with the necessary details, I find that Grievants did not engage in activities specified in Article 22, Section 3 that would, as a matter of contract, make the grievances not arbitrable.

The inquiry at this point is about arbitrability. The activities specified in Article 22, Section 3 which remove disputes from arbitration are general. If the parties negotiated specific provisions in the MCBA which further define or limit the prohibited activities in Article 22, Section 3, then in determining arbitrability – even in the context of this case where I have given the Agency the benefit of the doubt that E.O. 14,251 is valid authority to allow the Agency to terminate the MCBA effective August 8, 2025 – I can look to those other negotiated provisions for guidance in determining whether Grievants' activities fell under the activities prohibited by Article 22, Section 3 which would remove the grievances from the arbitration process.

The parties negotiated provisions in the MCBA which limit the Article 22, Section 3 prohibited activities.

In Article 25, Section 2 of the MCBA, the parties defined activities that if engaged in by employees would not amount to Article 22, Section 3 activity that would make grievances over discipline for those activities not arbitrable.

Article 25, Section 2 of the MCBA provides:

Article 25: Employee Rights

* * *

Section 2. Right to Private Lives

- A. Subject to applicable law, rule, regulation, and Agency policy employees have the right to direct and/or fully pursue their private lives, personal welfare and personal beliefs without harassment or bullying (as defined by Order 4711) by the Agency so long as such activities do not conflict with job responsibilities.

* * *

- C. The Right to Private Lives includes but is not limited to the following:

1. Employees generally have a 1st Amendment Right to Freedom of expression on social media platforms while not on duty time or Agency equipment so long as it does not violate law, rule, regulation, Agency policy, or otherwise interfere with their job duties.

* * *

3. In their private lives employees generally have a freedom of association, right to protest and/or march so long as it does not violate law, rule, regulation, Agency policy, or otherwise interfere with their job duties.

Article 25, Section 3 further protects "Employee Rights" by including "Merit Systems Principles" into the Agreement:

Section 3. Merit Systems Principles

As required by 5 U.S.C. 2301(b) (1) through (9), the Agency's personnel management program will be implemented with the following merit system principles *quoted verbatim*:

* * *

I. Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

1. a violation of any law, rule, or regulation, or
2. mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

And the MCBA goes further to protect "Employee Rights" with the provisions in Article 25, Section 4:

Section 4. Prohibited Personnel Practices

The following personnel practices are prohibited pursuant to 5 U.S.C. 2302(b)(1) through (14) and are *quoted verbatim*:

* * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

- (i) any violation of any law, rule, or regulation, or
- (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such

disclosures, of information which the employee or applicant reasonably believes evidences—

- (i) any violation (other than a violation of this section) of any law, rule, or regulation, or
 - (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
- (9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—
- (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—
 - (i) with regard to remedying a violation of paragraph (8); or
 - (ii) other than with regard to remedying a violation of paragraph (8);
 - (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);
 - (C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
 - (D) refusing to obey an order that would require the individual to violate a law, rule, or regulation;

Grievants signed a "Declaration of Dissent". A reading of that full letter addressed to EPA Administrator Zeldin with copies to the U.S. Senate Committee on Environment & Public Works, U.S. House Committee on Energy and Commerce, U.S. House Committee on Science, Space, and Technology, Members of Congress (see above at II(D)) shows that the statements and concerns articulated by Grievants (and others) fall squarely within the protections of the "Employee Rights" provisions of Article 25, Sections 2, 3, and 4 of the MCBA quoted above. For purposes of

determining arbitrability, with those protections found in Article 25, Sections 2, 3, and 4, the prohibited activities stated in Article 22, Section 3 of the MCBA do not apply to Grievants' activities of signing the Declaration of Dissent that would exclude the protests over the imposed discipline from the grievance procedure and remove my jurisdiction to hear and decide those grievances in arbitration.

5. Other Authority

When the Agency advised me on June 30, 2026 that "EPA is not participating in arbitration proceedings arising under CBAs terminated pursuant to Executive Order 14,251, including the matter currently before you" it provided "a recent arbitration decision holding proceedings in abeyance pending resolution of the ongoing Executive Order litigation." That decision (an "Order on Jurisdiction") in *EPA and AFGE, Council 38*, FMCS No. 250319-04491 (October 24, 2025) ordered that "A decision on the merits of the grievance is postponed ... [and j]urisdiction in this matter shall be retained and the case will be held in abeyance pending resolution of the ongoing litigation over the validity of the EO."

In this case, I cannot follow that Order on Jurisdiction.

The parties are free to agree to hold cases in abeyance pending the outcome of the litigation over the validity of EO 14,251. Indeed, I have had that happen – but the parties *agreed* there to await the outcome of the litigation, and I naturally deferred to their agreement.

That agreement to wait has not happened here. In this case, AFGE insists on moving forward with the dispute and the Agency has refused to participate. I must therefore face the issues raised – the threshold question being that because I cannot confer jurisdiction upon myself and even with the Agency's refusal to participate, as an arbitrator I still must be certain that I have jurisdiction to resolve the dispute.

And given all of the litigation that is pending over EO 14,251, I must also be certain that no court has enjoined this proceeding from moving forward.

The Order provided by the Agency interpreted EO 14,251, specifically Section 6's Implementation provision ("each applicable agency head shall, *upon termination of the applicable collective bargaining agreement*: ... terminate agency participation in any pending grievance proceedings" [emphasis added]). As discussed above at III(A)(3), when it issued on March 27, 2025, EO 14,251 did not terminate the agencies' collective bargaining agreements, nor did it do so retroactively. By its plain language, the implementation provisions of Section 6 of EO 14,251 showed a grant of authority by the president to the agencies for *future* action to be exercised by the agencies to terminate the collective bargaining agreements – "each applicable agency head shall, *upon termination of the applicable collective bargaining agreement* ... terminate agency participation in any pending grievance proceedings ..." [emphasis added] which the Agency here (EPA) did not exercise until it terminated the MCBA on August 8, 2025 (over four months after issuance of EO 14,251). EO 14,251 did not, *on its own*, terminate the collective bargaining agreements on March 27, 2025 or do so retroactively.

AFGE provided an award in *NTEU and IRS (Return to Work Directive; Cancellation of Telework and Remote Work)* (July 15, 2026), which held that "the facts giving rise to the claimed contract violations accrued before the contract was terminated ... the actions grieved here occurred on February 27, 2025, with effective dates of March 8 and 20, 2025 ... [and t]hus the facts giving rise to the claimed contract violations accrued before the contract was terminated." The arbitrator in that case concluded that "[c]onsequently, irrespective of the Exclusions EO [14,251] ... the present grievance is properly before me for decision."

The conclusion in the award provided by AFGE is the better-reasoned result applicable to this case than is the Order provided by the Agency.

However, I do not take the provided authority as binding upon me (the Agency's provided authority is simply an "order") and AFGE's provided award arises under a contract different from the one involved in this case. I just take the authority provided as different approaches arbitrators are taking in light of EO 14,251.

6. Selection Of The Undersigned As The Arbitrator In This Case

During the initial processing of this case, there appeared to be a question over whether I was the selected arbitrator to hear this matter. The Agency has not specifically objected to my selection as the arbitrator for this case but has taken the position that "[o]n August 8, 2025, EPA terminated its collective bargaining agreement (CBA) with AFGE pursuant to Executive Order 14251 ... EPA is not participating in arbitration proceedings arising under CBAs terminated pursuant to Executive Order 14251, including the matter currently before you. EPA's position is that questions concerning the continued applicability of Chapter 71 of Title 5 are properly reserved for the FLRA and the federal courts to resolve."³²

As discussed above at II(F), AFGE selected the undersigned to function as the arbitrator for this case.³³ The Agency's objection to the process in general and effectively raising arbitrability as the basis for that objection is not specific objection to the named arbitrator selected under authority in Article 23, Section 2(G) of the MCBA to decide that arbitrability dispute.

³² Email dated June 30, 2026.

³³ Attached to an email dated April 8, 2026 from AFGE counsel to the FMCS and quoting Article 23, Section 2(G) of the MCBA ("[i]f the non-invoking party refuses to participate in the selection of an arbitrator, then the invoking party is entitled to select the arbitrator from the FMCS list."), AFGE advised the FMCS that under authority of Article 23, Section 2(A) and (F) [G] of the MCBA, "the Union selects Arbitrator Edwin H. Benn from the panel provided in FMCS Case No. 260406-05256".

The Agency could have appeared in this case for limited reasons of contesting arbitrability, but chose not to do so.

The arbitration provisions of the MCBA are found in Article 23. Because the grievances are arbitrable and the arbitration provisions survived the termination of the MCBA, the entirety of Article 23 survives for this case.

Article 23, Section 2(G) of the MCBA provides:

Section 2. Arbitrator Selection and Site/Timing of the Hearing

* * *

- G. ... If the non-invoking party refuses to participate in the selection of an arbitrator, then the invoking party is entitled to select the arbitrator from the FMCS list.

AFGE invoked arbitration in this case.³⁴ Under Article 23, Section 2(G), the Agency is the “non-invoking party”. Throughout, the Agency has refused to participate in the grievance and arbitration process. Pursuant to Article 23, Section 2 of the Agreement which survived the August 8, 2025 termination of the MCBA, even if the courts uphold the Agency’s ability to terminate the MCBA, under Article 23, Section 2(G), “... the invoking party is entitled to select the arbitrator from the FMCS list.” Under that section my selection by the invoking party AFGE to serve as the arbitrator is therefore proper.

Pension Benefit Guarantee Corporation, supra, 68 FLRA at 1004 squarely decided this issue when it addressed topics that continue after a collective bargaining agreement expires [footnotes omitted]:

These continuing policies, practices, and matters encompass negotiated grievance and arbitration procedures. And negotiated

³⁴ AFGE Exhibit 13.

grievance and arbitration procedures include the selection of an arbitrator.

Further, *Pension Benefit Guarantee Corporation*, (*id.* at note 70) relied upon *U.S. Department of Transportation, FAA, Washington D.C. and National Air Traffic Controllers Association*, 65 FLRA 208, 211 (2010):

... [C]hoosing an arbitrator to hear a grievance, pursuant to the procedures the parties agree to for choosing arbitrators, is a fundamental component of the binding arbitration process.

Putting aside that the Agency never objected to my selection as the arbitrator in this case, by refusing to participate in the grievance and arbitration procedures of the MCBA including the selection process through the FMCS, the Agency effectively abandoned and waived any rights it had concerning my selection as the arbitrator in this case including rights it may have had under the FMCS selection process.

Article 23 of the MCBA which survived the termination of the MCBA (*see discussion above at III(A)(2)-(5)*) specifically provides [emphasis added]:

Article 23: Arbitration

* * *

Section 7. Hearing Procedures.

* * *

- G. **Arbitrability and Grievability Determinations** – *The Arbitrator* shall have the authority to make *all* arbitrability and/or grievability determinations. The arbitrator shall make grievability and/or arbitrability determinations prior to addressing the merits of the original grievance.

As discussed above at III(A), the arbitration provisions of the MCBA in Article 23 survived termination of the MCBA. Under the provisions of Article 23, Section 2(G), I was properly selected as the arbitrator which means that under Article 23,

Section 7(G), as the selected arbitrator, I “have the authority to make *all* arbitrability and/or grievability determinations” [emphasis added].

I have done that. I have found the grievances are arbitrable. I was properly selected as the arbitrator under Article 23, Section 2(G) and Article 23, Section 7(G) gives me as the arbitrator “the authority to make *all* arbitrability and/or grievability determinations.”

7. Conclusion On Arbitrability

Based on the above, the grievances are arbitrable. Even if it is finally found by the courts that EO 14,251 permits the Agency to terminate the MCBA, because the relevant events in this case occurred before the August 8, 2025 termination of the MCBA, for these grievances, the grievance and arbitration provisions of the MCBA continued in effect past the August 8, 2025 termination of the MCBA.

B. The Merits

1. Proceeding Ex Parte

The Agency refused to participate in the arbitration process. It is well-settled that arbitrators can proceed ex parte where a party refuses to attend or participate in an arbitration. *Equal Employment Opportunity Commission and American Federation of Government Employees, Local No. 216*, 48 FLRA (No. 85) 822 (1993) (“The Authority has consistently held that arbitration awards are not deficient on the ground that an arbitrator held an ex parte hearing when a party to the arbitration refused to be present at the arbitration hearing.”). *See also, Warner Robins Air Logistics Center Department of the Air Force Warner Robins, Georgia and American Federation of Government Employees, Local No. 987*, 24 FLRA (No. 95) 968 (1986):

Moreover, the award was not procured by ex parte contacts with the arbitrator since the hearing was conducted with the

knowledge of the Union and its absence was by choice. Also, awards resulting from ex parte hearings have been enforced by Federal courts based upon the rationale that since the losing party had a chance to be heard and refused to participate it should not now complain that the award is invalid because it chose to stay away. *Amal. Meat Cutters & Butcher Workmen v. Penobscot Poultry Co.*, 200 F. Supp. 879 (D. Me. 1961); see also *Joint Board of Cloak, Skirt and Dressmakers Union v. Senco, Inc.*, 289 F. Supp. 513 (D. Mass. 1968).

Throughout, the Agency has been sent notices of these proceedings, including the scheduling orders and the Agency acknowledged receipt. See June 30, 2026 Agency email from the Agency stating "Receipt confirmed" of the Supplemental Scheduling Order with the Agency stating that "EPA is not participating in arbitration proceedings arising under CBAs terminated pursuant to Executive Order 14251, including the matter currently before you."

Because I was the selected arbitrator to hear this case and with the Agency refusing to participate, I could therefore proceed *ex parte*.

2. The Standard And The Burden

As provided in the MCBA, the Agency has the burden of proof to be shown by a preponderance of the evidence:

Article 21: Discipline

* * *

Section 7. Grievance/Appeal

* * *

- C. To the extent not prohibited by law, arbitrators will apply a preponderance of the evidence standard to letters of reprimand and adverse actions.
- D. The Agency has the burden of proof for all actions taken under this Article.

3. Has The Agency Met Its Burden?

I find that the Agency has not met its burden of proof.

There is no dispute that Grievants signed the Declaration of Dissent.³⁵

However, there is no evidence of any adverse effect on the efficiency of Agency that flowed from Grievants signing the Declaration of Dissent. There is no evidence that any complaints, workplace disruptions, or operational impact occurred as a result of Grievants signing the Declaration of Dissent. The Agency raised assertions of Grievants' actions constituting conduct that were "... disruptive to the workforce, undermines the authority and direction of the Agency leadership, and impacts EPA's ability to build trust with the American people" as well as that "[t]he publicity has had a negative impact on the reputation of the Agency and has distracted from EPA's mission to protect human health and the environment."³⁶ However, the Agency has provided no proof to support any of those assertions.

The un rebutted evidence before me shows that Grievants signed the Declaration in a personal capacity, on their own time and without using Agency resources – all they did was sign.³⁷

As AFGE argues, examination of the Declaration of Dissent shows that under the MCBA "[t]he charged conduct is protected expression."³⁸ Article 25, Section 2(C)(1) of the MCBA provides that "Employees generally have a 1st Amendment Right to Freedom of expression on social media platforms while not on duty time or Agency equipment so long as it does not violate law, rule, regulation, Agency policy, or otherwise interfere with their job duties" and Section 2(C)(3) of that article

³⁵ AFGE Brief at 18; AFGE Exhibits 5, 9(e) and 9(f).

³⁶ See AFGE Exhibits 9(a)-(d), Agency's Analysis and Penalty Considerations, Factors 1, 8.

³⁷ AFGE Exhibits 5 at 5 ("Who We Are"), 9.

³⁸ AFGE Brief at 21.

provides "[i]n their private lives employees generally have a freedom of association, right to protest and/or march so long as it does not violate law, rule, regulation, Agency policy, or otherwise interfere with their job duties." Under those sections of the MCBA, Grievants engaged in protected activity.

Further, Article 25, Section 3(I) of the MCBA protects employees against reprisal for lawful disclosure of information the employees believe to be "...violation of any law, rule or regulations, or mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety." And Article 25, Sections 4(8) and (9) prohibit personnel actions by the Agency for listed protected activities specified in those sections.

Suspending Grievants for articulating their concerns in the Declaration of Dissent violates those sections in Article 25.

The Agency candidly admits that its reasons for suspending Grievants were for prohibited reasons. For each Grievant, the Agency's deciding official Anne Vogel wrote in the Decisions on Proposed Suspensions in her "Analysis and Penalty Consideration" imposing the 14-day suspensions:³⁹

... Even if your public statements, which were disagreements on Agency policy decisions, warranted First Amendment or merit systems protections, the Agency is not required to tolerate actions from its employees that undermine the Agency's decisions, interfere with the Agency's operations and mission, and the efficient fulfillment of the Agency's responsibilities to the public. ...

Again, there is no proof from the Agency supporting the last part of Vogel's conclusion (that Grievants' actions of signing the Declaration of Dissent "undermine the Agency's decisions, interfere with the Agency's operations and mission, and the

³⁹

AFGE Exhibits 12(a) at 2

efficient fulfillment of the Agency's responsibilities to the public"). But the first part of Vogel's conclusions are correct ("... your public statements, which were disagreements on Agency policy decisions, warranted First Amendment or merit systems protection"). The Agency is of the opinion that it "... is not required to tolerate [these] actions from its employees". The protections in the MCBA and its incorporated statutory and constitutional protections which the Agency contends it "is not required to tolerate" say different.

AFGE is also correct that Grievants were disciplined for asserting rights emanating from the MCBA as they were engaging in protected activity under 5 U.S.C. Section 7102 and cannot be disciplined for that.⁴⁰

In *National Labor Relations Board v. City Disposal Systems, Inc.*, 465 U.S. 822 (1982), the collective bargaining agreement provided that "[t]he Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified." 465 U.S. 824-825. An employee covered by the collective bargaining agreement was discharged when he refused to drive a truck that he honestly and reasonably believed to be unsafe and the discipline was grieved under contract.

In *City Disposal*, the Court upheld the NLRB's *Interboro* doctrine (*Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enfd.*, 388 F.2d 495 (2nd Cir. 1967) which held that an individual's assertion of a right grounded in a collective-bargaining agreement is "concerted activit[y]" under Section 7 of the NLRA. According to the Court in *City Disposal*, 465 U.S. 831-832 [footnote omitted]:

⁴⁰ AFGE Brief at 22-23.

The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process — beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement — is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharass the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

The Authority later adopted the *City Disposal* rationale. *U.S. Department of Labor Employment and Training Administration San Francisco and Lou Ann Bassan*, 43 FLRA (No. 86) 1036 (1992):

... [A]s the Court pointed out in *City Disposal* with regard to the NLRA, the purposes of the Statute "explicitly include the encouragement of collective bargaining" 465 U.S. at 833-34. Particularly relevant to our inquiry is the Court's statement that:

"by applying § 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the . . . doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right

grounded in a collective bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also into the entire process envisioned by Congress as the means by which to achieve industrial peace."

Id. at 835-36. This statement applies just as strongly in the context of the Statute and the legislative intent to ensure "the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them[.]" 5 U.S.C. § 7101. Thus, we conclude, as did the Judge, that when an individual employee asserts a right that emanates from a collective bargaining agreement, that employee is engaging in the protected activity under section 7102 of the Statute of assisting the union that negotiated the agreement. In reaching this conclusion, we also note the Court's characterization of joining and assisting a labor organization as concerted activities that are, by their nature, "related to collective action ... Id. at 832.

Accordingly, we find that as the Charging Party was discharged for asserting a contractual right, the discharge violated section 7116(a)(1) and (2) of the Statute. We shall order an appropriate remedy.

Article 25, Sections 2(C)(1) and (3) of the MCBA guarantee Grievants' rights to First Amendment freedom of expression and association (which they exercised on in their personal capacity, on their time, and without Agency resources and their doing so did not interfere with their job duties). Grievants exercising those rights are therefore protected under 5 U.S.C. Section 7102. *U.S. Department of Labor Employment and Training Administration, supra*. Grievants cannot be disciplined for engaging in those rights that are incorporated into and emanate from the MCBA.

Further, the Declaration of Dissent is also directed to members of Congress (the U.S. Senate Committee on Environment & Public Works, U.S. House Committee on Energy and Commerce, U.S. House Committee on Science, Space, and Technology,

Members of Congress).⁴¹ 5 U.S.C. Section 7211 provides that “[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.” Article 22, Section 2(C)(2) of the MCBA provides that “[a] grievance means any complaint ... [b]y the Union or the Agency concerning ... [a]ny claimed violation, misrepresentation, or misapplication of law, rule, or regulation affecting conditions of employment.”

Grievants had a statutory and constitutional right under 5 U.S.C. Section 7211 to petition members of Congress, which they exercised through the Declaration of Dissent. Article 21, Section 3(B)(4) of the MCBA provides for issuance of “Formal Disciplinary Actions” which include “Adverse Actions (Suspensions, Removals Reductions in Grade or Pay or Furloughs for thirty (30) Days or Less) ... [and that] Adverse actions will be taken to promote the efficiency of the service.”

According to the Agency in the Notices of Proposed Suspensions issued by the Chief of Staff, Office of the Regional Administrator Tiffani Kavalec, there were three specifications for charges for each Grievant – all clearly charging Grievants with misconduct because “you admitted that you signed a ‘Declaration of Dissent’ posted to standupforscience.net” and recommended 14-day suspensions for Grievants.⁴²

The Decisions on Proposed Suspensions issued by Regional Administrator Anne Vogel for each Grievant, Vogel concluded that “I concur entirely with Ms. Kavalec’s analysis and penalty”⁴³

⁴¹ AFGE Exhibit 5.

⁴² AFGE Exhibits 9(a) at 1-2, [REDACTED]

⁴³ AFGE Exhibits 12(a) at 2, III; 12(b) at 2, III; 12(c) at 2, III; 12(d) at 2, III.

Clearly, and as admitted by the Agency, Grievants were disciplined and suspended for signing the Declaration of Dissent and exercising their statutory right to petition Congress. However, Grievants' conduct of petitioning Congress cannot be considered by the Agency as deserving of discipline because that discipline against Grievants must "... be taken to promote the efficiency of the service" which is a requirement of Article 21, Section 3(B)(4) of the MCBA for Adverse actions. How does disciplining employees for petitioning Congress "promote the efficiency of the service"? The Agency has not answered that question.

In sum, the Agency has not shown that Grievants' engaged in misconduct by signing the Declaration of Dissent or that Grievants' actions in doing so deserved discipline because disciplining Grievants was "taken to promote the efficiency of the service." Grievants did nothing but exercise their protected rights. The Agency has not met its burden.

4. Other Arguments Made By AFGE

AFGE argues that the Agency violated the procedural guarantees of Article 21 of the MCBA.⁴⁴ In light of my finding that Grievants did not engage in misconduct, that argument is moot and need not be addressed.

AFGE also argues that the penalty is unreasonable under the MCBA, EPA Order 3120.1 and the *Douglas* Factors.⁴⁵ Again, because I have found that Grievants did not engage in misconduct, those arguments are moot and need not be addressed.⁴⁶

⁴⁴ AFGE Brief at 25.

⁴⁵ *Id.* at 26-29.

⁴⁶ AFGE notes that on July 2, 2026, OPM and the MSPB jointly proposed a rule that would replace the *Douglas* factors standard used by MSPB with a totality of the circumstances standard. See Promoting Employee Accountability, 91 Fed. Reg. 40,444 (proposed July 2, 2026). AFGE argues that the proposed rule is not final and would not apply to this case given that the Agency invoked the *Douglas* factors. See AFGE Brief at 28, note 3. [footnote continued on next page]

5. Conclusion On Whether Grievants Engaged In Misconduct

This is not a default award. I have given the Agency every possible opportunity to participate and have kept it fully advised of each step in the arbitration process before me. Nevertheless, the Agency has refused to participate. With the Agency not participating, factual demonstrations made by AFGE are not rebutted. However, as discussed in full above, Grievants protected activities and the Agency's own documentation of its actions underpin the determinations made in this case necessitating a finding on the merits that Grievants did not engage in misconduct.

Based on the evidence before me in this case, the Agency has not carried its burden to show that Grievants engaged in misconduct.

C. The Remedy

AFGE seeks the following remedy:⁴⁷

The Arbitrator is authorized to make each grievant whole, "including the authority to award back pay and interest, reinstate, . . . and to issue an order to expunge the record of all references to a disciplinary . . . action." Ux. 1, Art. 23, § 10(B); 5 U.S.C. § 5596. That authority is coextensive with the Authority's own; an arbitrator standing in the Authority's shoes may fashion the same make-whole remedies, limited only by the grounds for exception in 5 U.S.C. § 7122. NTEU & FDIC, 48 FLRA 566, 570 (1993).

[continuation of footnote]

On September 3, 2026 (after AFGE filed its brief) the MSPB rule was finalized, providing that effective October 5, 2026 as summarized (91 Fed. Reg. 56,549):

The Merit Systems Protection Board (MSPB or Board) is issuing a final rule amending its regulations governing the Board's review of the reasonableness of an agency's chosen penalty in misconduct-based adverse actions appealed to the Board. Under the final rule, the Board will no longer require consideration of the 12 factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), in every case. Instead, the Board will evaluate whether the agency's penalty is within the tolerable limits of reasonableness in light of the totality of the circumstances, determined on a case-by-case basis.

<https://www.federalregister.gov/d/2026-18061/page-56549>

For reasons just discussed, that new rule is not applicable to this case because I have found that Grievants did not engage in misconduct.

⁴⁷

AFGE Brief at 29.

That requested relief is granted. In accord with the provisions cited by AFGE, the disciplinary actions issued to Grievants in this case shall be rescinded; Grievants' records shall be expunged of all references to the suspensions issued to them in this case and Grievants shall be made whole including receipt of backpay for lost compensation for the periods of suspension, with interest.

AFGE also seeks an award of reasonable attorney fees:⁴⁸

The Back Pay Act further authorizes an award of reasonable attorney fees where the grievant is the prevailing party and an award is "warranted in the interest of justice." 5 U.S.C. § 5596(b)(1)(A)(ii); *id.* § 7701(g). An award is warranted in the interest of justice where, among other circumstances, the agency's action was clearly without merit or the agency knew or should have known it would not prevail. Suspensions imposed on an evidentiary record devoid of proof, for conduct the MCBA expressly protects, satisfy that standard.

Again, I agree. In a case such as this and for reasons discussed in this matter, an attorney fees award is warranted to AFGE as the prevailing party. That award of attorney fees is made because to do so is in the interest of justice, because the Agency's actions were so clearly without merit and because the Agency knew or clearly should have known it would not prevail. For reasons stated by AFGE, I find that an award of reasonable attorney fees is appropriate.

As permitted, I will retain jurisdiction over the calculation of back pay, the fee petition and compliance.

⁴⁸ *Id.* at 29-30.

IV. AWARD

1. The grievances are arbitrable.
2. The Agency has not proven by a preponderance of the evidence that Grievants engaged in misconduct.
3. As a remedy and as set forth above at III(C), the disciplinary actions issued to Grievants shall be rescinded; Grievants' records shall be expunged of all references to the suspensions issued to them and Grievants shall made whole including receipt of backpay for lost compensation for the periods of suspension, with interest.
4. As further set forth above at III(C), AFGE is entitled to reasonable attorney fees.
5. As permitted, I will retain jurisdiction over the calculation of back pay, any fee petition, and compliance.



Edwin H. Benn
Arbitrator

Dated: September 9, 2026