71 FLRA No. 47

NATIONAL WEATHER SERVICE
EMPLOYEES ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
NATIONAL WEATHER SERVICE
(Agency)

0-AR-5363

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DECISION

August 8, 2019

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

A provision in the parties' 1986 collective-bargaining agreement (CBA) provided that, if negotiations of a successor agreement could not be completed within ninety days and neither party requested the intervention of the Federal and Mediation Conciliation Service (FMCS) or the Federal Service Impasses Panel (FSIP or Panel) during negotiations, either party could terminate all or part of the agreement. In July 2017, the Agency terminated the parties' agreement after the parties were unable to agree to the terms of a new agreement within ninety days.

The Union filed a grievance alleging that the Agency's termination violated Article 29, § 3 of the CBA and that this breach also constituted an unlawful repudiation. Arbitrator Laurence M. Evans determined that the Agency violated the agreement, but also held that the Agency's actions did not constitute an unfair labor practice (ULP). The Union and the Agency both filed exceptions.

For the reasons explained below, we conclude that the Agency's termination was consistent with the requirements and intent of Article 29, § 3, and we vacate the Arbitrator's award. We also deny the Union's exception regarding its charge that the Agency unlawfully repudiated the agreement when it exercised its option to terminate the agreement. Without an underlying contractual breach to support it, a repudiation ULP is untenable.

II. Background and Arbitrator's Award

The parties to this case seem to be unable to agree on much of anything – not the ground rules for negotiating a new agreement and not the actual terms of the agreement.

But this is nothing new. In 1986, the parties were unable to reach agreement on the terms of an agreement without the intervention of the Panel, which asserted jurisdiction over an impasse between the parties concerning "the length of time to be allowed for the negotiation of a successor agreement."[1] In its decision, the Panel required the parties to adopt the following provision, which became Article 29, § 3 of the agreement:

> This Agreement will remain in effect for [ninety] calendar days from the start of formal renegotiation or amendment of said Agreement, exclusive of any time necessary for FMCS or FSIP proceedings. If at the end of the [ninety]-calendar day period an agreement has not been reached and the services of neither FMCS [n]or FSIP have not been invoked, either party may, upon written notification to the other, terminate any or all sections of the Agreement.[2]

The parties executed an agreement with the Panel-imposed provision, and they most recently re-approved the provision in October 2001.[3]

Then, in the summer of 2015, the Agency notified the Union that it wanted to renegotiate the CBA. The parties were unable to agree on ground rules on their own. Through any number of fits and starts over the course of sixteen months, from the summer of 2015 through October 2016, and, with the intervention of the Panel, the parties agreed to ground rules and executed a memorandum of understanding (MOU) on December 7, 2016.[4]

[1] *Dep't of Commerce, Nat'l Weather Serv., Wash., D.C.*, 86 FSIP 30 (1986) (*Commerce*).
[2] Award at 1-2.
[3] *Id.* at 1.
[4] *Id.* at 2-5.

The Agency and Union exchanged substantive proposals with each other between January and March 2017, during which time the Union's chief negotiator requested assistance from FMCS,[5] but the Agency never joined in that request.[6]

Finally, the parties held their first face-to-face substantive negotiating session on April 4, 2017.[7] Although the record is not clear how often and for how many days the parties engaged in negotiations, the ground rules MOU stipulated that the parties were to meet for "three days per week . . . in each of two consecutive week sessions followed by two weeks in between, unless mutually agreed to otherwise."[8] What is clear is that the parties did not reach agreement within ninety days from April 4, 2017.

On July 21, 2017, the Agency terminated the agreement pursuant to Article 29, § 3.[9] Three days later, the Union filed this grievance[10] alleging that, when it terminated the contract, the Agency violated Article 29, § 3 of the CBA and § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute).[11] At arbitration, the parties stipulated to three issues: (1) did the Agency violate Article 29, § 3 when it terminated the CBA on July 21; (2) did the Agency commit a ULP by repudiating the CBA; and (3) if so, what should the remedy be?[12]

With respect to the first issue, the Arbitrator found that the dispute turned on when "formal renegotiation" of the CBA began.[13] The Arbitrator also found that Article 29, § 3 "is silent as to what the parties intended the 'start of formal renegotiation' to mean."[14] According to the Arbitrator, the negotiations surrounding the ground rules "contain[ed] all of the indicia[15] of 'formal' negotiations whether 'substantive' or not."[16] Therefore, he determined that, under Article 29, § 3,"'formal renegotiation' . . . began when ground rule[s] negotiations began.[17]

The Arbitrator alternatively found that, even if the term "formal renegotiation" was intended to apply only to substantive negotiations,[18] substantive negotiations began in January 2017, when the Agency submitted its first round of proposals. Thus, the Arbitrator rejected the Agency's argument that "formal renegotiation" did not begin until April 4, with the first face-to-face bargaining session.[19] Based on these findings, the Arbitrator determined that the Union's contact with FMCS in February (and the Union's continuing contact with an FMCS mediator) "blocked" the Agency from its termination of the agreement.[20]

However, the Arbitrator rejected the Union's argument that the Agency's conduct also violated § 7116(a)(1) and (5) of the Statute. The Arbitrator found that, despite terminating the agreement, the Agency still participated in the negotiated grievance procedure, and that "all provisions of the CBA remain[ed] in effect."[21] Therefore, on the ULP charge, the Arbitrator concluded that the Agency's violation of Article 29, § 3 "[was] not tantamount to a repudiation of the CBA."[22]

On March 29, 2018, the Union filed an exception to the award. On March 30, 2018, the Agency also filed an exception to the award. On April 16, 2018, the Union filed an opposition to the Agency's exception.

III. Analysis and Conclusions

A. The award fails to draw its essence from Article 29, § 3.

The Agency argues that the award fails to draw its essence from the CBA. The Authority will find that an arbitration award fails to draw its essence from the CBA when, as relevant here, the award is so unfounded in reason and fact and so unconnected with the wording and purposes of the CBA as to manifest an infidelity to the obligation of the arbitrator.[23]

We agree with the Arbitrator that this case turns on the question of when "formal" renegotiations began as

[5] *Id.* at 5
[6] Award at 6 ("On July 25, 2017, [the FMCS mediator,] by email, wrote to [the Union president and the Agency's chief negotiator,] stating: 'FMCS must receive[] a joint request from the parties before we can assist the parties with collective bargaining mediation.'").
[7] *Id.* at 5-6.
[8] Agency's Exception, Union Exhibit 13, Ground Rules MOU at 2 (quoting § 6).
[9] Award at 5.
[10] *Id.* at 6.
[11] *Id.* (citing 5 U.S.C. § 7116(a)(1), (5)).
[12] *Id.* at 14.
[13] *Id.* at 15.
[14] *Id*.
[15] *Id.* at 16 ("extended bargaining, an agreed-upon six (6) page, 28 paragraph MOU on ground rules, FMCS/FSIP participation on numerous occasions, all followed by Agency head review and approval of the ground rules agreement pursuant to the Statute").
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 17.
[21] *Id.* at 18.
[22] *Id.*
[23] *E.g.*, *U.S. Dep't of State, Passport Servs.*, 71 FLRA 12, 13 n.18 (2019) (*Passport Servs.*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028, 1030 n.11 (2018) (Member DuBester dissenting).

that term is used in Article 29, § 3.[24] We also agree with his acknowledgment that the ground rules negotiations are not "substantive."[25] But the Arbitrator's reliance on several extraneous factors – on how long those preliminary negotiations dragged on, the length of the MOU, and the fact that FMCS and FSIP had to get involved in those negotiations – led to conclusions about when "formal" renegotiations began that are not consistent with the undisputed purpose and intent of Article 29, § 3.[26]

This case is unique because the disagreement here arises from a provision that was drafted and mandated by a ruling of the Panel in 1986, and the Panel's decision makes clear the provision's intent and purpose. That decision was necessitated because the parties could not agree how, when, and under what circumstances a successor agreement would be triggered and negotiated. Because the parties had such difficulties in coming to agreement on the terms of that prior agreement, the Panel determined that a "specific time limitation [of ninety days] for the negotiation of a *successor agreement*" was necessary to create an "incentive for both parties to *complete* negotiations in an expeditious manner."[27]

As the Panel intended Article 29, § 3 to incentive the *completion* of negotiations, ground-rules bargaining – which merely marked the *start* of negotiations – could not, and did not, trigger the ninety-day period for "formal renegotiations" under Article 29. Moreover, in keeping with the purpose of Article 29, § 3, the Union's request for FMCS assistance in February – before the Union even provided the Agency with counterproposals – could not stop the clock under Article 29.

Taking the Arbitrator's contrary reasoning to its logical conclusion, either party could entirely defeat the purpose of Article 29, § 3 simply by requesting FMCS or FSIP assistance the day after one party requests the negotiation of a new agreement, the first day of ground rules negotiation, the first day of formal renegotiation, and, as in this case, even before that party submits one proposal or counterproposal.

However, the Panel's intent was obvious and clear – the mandated provision was to assist the parties in reaching a quick agreement whenever they attempted to renegotiate a successor agreement. In other words, it provided a start time, an end time, and explained what the parties needed to do to prevent a termination. Thus, the Arbitrator's interpretations – that the negotiation of ground rules started "formal renegotiation[s]" and that the Union's contact with FMCS in February "block[ed]" the Agency from its termination of the agreement[28] – are so "unconnected with the wording and purposes of [Article 29, § 3]" that those interpretations "manifest an infidelity" to his obligations as arbitrator of this dispute.[29]

Accordingly, we grant the Agency's essence exception.

B. The Agency's termination did not constitute a repudiation.

The Union argues that the award is contrary to law,[30] asserting that the Arbitrator improperly found that the Agency did not unlawfully repudiate the CBA in violation of § 7116(a)(1) and (5) of the Statute.

In determining whether a repudiation has occurred, the Authority first considers the nature and scope of the alleged breach of the agreement.[31] Because, as explained above, we find that the Agency acted in accord with Article 29, § 3 and did not violate that provision, there is no underlying contractual breach to support a finding that the Agency unlawfully repudiated the parties' agreement.[32] Therefore, we deny this exception.

[24] Award at 16.
[25] *Id.*
[26] *Id.*
[27] *Commerce*, 86 FSIP at 32-33 (emphasis added).
[28] Award at 17.
[29] *Passport Servs.*, 71 FLRA at 13 n.18.
[30] Where a party claims that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo. In applying a de novo standard of review, the Authority assesses whether the Arbitrator's legal conclusions are consistent with the applicable standard of law. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[31] *U.S. DOJ, Fed. BOP*, 68 FLRA 786, 788 (2015) (Member Pizzella dissenting in part).
[32] *See U.S. Dep't of the Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 785 (2018) (Member DuBester dissenting); *U.S. Dep't of VA, Consol. Mail Outpatient Pharmacy*, 60 FLRA 844, 850 (2005) (Member Pope dissenting) (finding where the meaning of a particular agreement term is unclear and a party acts in accordance with a reasonable interpretation of that term, that action will not constitute a clear and patent breach of the terms of the agreement); *see also Dep't of Air Force, 375th Mission Support Squadron, Scott Air force Base, Ill..*, 51 FLRA 858, 862 (1996) (two elements examined in analyzing an allegation of repudiation are the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?) and the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?)).

IV. Decision

We vacate the award.[33]

Member DuBester, dissenting:

Contrary to the majority's decision, I would uphold the Arbitrator's award finding that the Agency improperly terminated the parties' collective-bargaining agreement. I would also find that the Agency unlawfully repudiated the parties' agreement.

The majority's conclusion that the award does not draw its essence from Article 29, § 3 of the parties' agreement is flawed for several reasons.[1] The Arbitrator concluded that the parties started formal renegotiations of their agreement when they began negotiating ground rules in the summer of 2015. On this point, he found that the parties' bargaining history regarding the ground rules contained "all of the indicia of 'formal' negotiations whether 'substantive' or not."[2] In support, he notes that there was "extended bargaining, an agreed-upon six . . . page, [twenty-eight-]paragraph [ground-rules agreement], FMCS/FSIP participation on numerous occasions, all followed by Agency[-]head review and approval of the ground[-]rules agreement pursuant to the Statute."[3] Based on these findings, the Arbitrator properly determined that formal renegotiations under Article 29, § 3 began when the ground-rules negotiations began, and that either party's right to terminate the agreement expired when the Union and Agency requested FMCS/FSIP assistance.[4]

While faulting the Arbitrator's reliance upon these factors because they were "extraneous" to whether the ground-rules negotiations were "formal,"[5] the majority fails to set forth factors it believes *would* be relevant to this determination. Moreover, the factors cited by the Arbitrator are hardly "extraneous" to the question of whether the parties were engaged in formal negotiations.[6] Indeed, the Authority has consistently held that "ground[-]rule negotiations are not separate from the

[33] Member Abbott acknowledges that Executive Order 13836, Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining, remains stayed by Order of the D.C. District Court. *See AFGE and NTEU v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018), *rev'd sub nom. AFGE, AFL-CIO v. Trump*, 929 F.3d 748 (D.C. Cir. July 16, 2019); *In re Trump*, 2019 WL 3285234 (D.C. Cir. July 19, 2019). Nonetheless, it is apparent that this E.O. addresses the very subject in dispute in this case. Section 1 of the E.O. establishes that elongated renegotiations of CBA's are not consistent with an effective and efficient Government. Section 5 distinguishes ground rules negotiations from substantive negotiations and imposes rigorous timelines for both processes. Member Abbott believes that waiting for the judicial resolution of the Executive Orders could have proved to be instructive here, but it is equally true that the parties already have waited far too long for an answer in this matter.

[1] When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will grant an exception claiming that an arbitration award fails to draw its essence from the parties' agreement only when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *Id.* The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* (quoting *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[2] Award at 16.

[3] *Id.* (footnote omitted).

[4] *Id.*

[5] Majority at 4.

[6] *Id.*

collective[-]bargaining process and the parties' mutual obligation to bargain in good faith."[7] And even the majority recognizes that the parties' commencement of ground-rules bargaining "marked the start of negotiations."[8]

The majority also finds that the Arbitrator's conclusion on this point is inconsistent with the purpose and intent of Article 29, § 3 and the 1986 decision by the Federal Service Impasses Panel (FSIP or Panel) that imposed this provision. It appears to base this conclusion upon the Panel's explanation that Article 29, § 3 was necessary to serve as an "incentive for both parties to complete negotiations in an expeditious manner."[9] But nothing about this explanation compels, or even suggests, that the commencement of ground-rules negotiations "could not, and did not, trigger the ninety-day period" for formal negotiations.[10]

Moreover, the Arbitrator's interpretation would not, as the majority concludes, allow either party to "entirely defeat the purpose of Article 29, § 3" by requesting FMCS or FSIP assistance during ground-rules negotiations or prior to the exchange of substantive proposals.[11] To the contrary, the Panel explicitly recognized in its 1986 decision that allowing "either party [to] prevent the terms of the contract from expiring" by requesting such assistance would "eliminat[e] the potential for unrest in the workplace should it have been allowed to lapse before a new agreement were reached."[12]

I also disagree with the majority's conclusion that the Union's requests for FMCS assistance in February 2017 "could not stop the clock under Article 29."[13] The Arbitrator concluded that – even assuming the ground-rules negotiations did not constitute "formal" renegotiations under Article 29, § 3 – the Agency's January 2017 submission of substantive proposals to the Union commenced formal renegotiation of the successor agreement. He then found that the Union's multiple requests for FMCS assistance in February 2017 "fully compl[ied] with the requirements set forth in Article 29, § 3 to 'block' CBA termination."[14]

This conclusion is entirely consistent with the language of Article 29, § 3, which allows the agreement to be terminated at the end of the ninety-day period only if the services of the FMCS or FSIP have not been "invoked."[15] Relying upon dictionary definitions of this term, the Arbitrator found that this provision simply required a party "to call for, appeal, [or] petition for assistance."[16] He also correctly noted that there is no requirement in Article 29, § 3 that either the FMCS or FSIP "accept the request for assistance."[17] This interpretation is consistent with the Panel's 1986 decision, which explains that either party could prevent the agreement from expiring by *requesting* the services of the FMCS or FSIP before the end of the ninety-day period.[18] And nothing in the language of Article 29, § 3 or the Panel's 1986 decision states, or even suggests, that such a request would be ineffective simply because the Union submitted it before providing the Agency with counterproposals.

The Arbitrator's conclusion that the Agency violated Article 29, § 3 of the parties' agreement reflects an entirely plausible interpretation of the agreement under any objective standard. And as I have previously cautioned, the majority "should not be substituting its own judgment simply to reach a different outcome on the merits."[19]

I would also grant the Union's contrary-to-law exception[20] asserting that the Arbitrator improperly concluded that the Agency did not unlawfully repudiate

[7] *AFGE, Local 12*, 60 FLRA 533, 539 (2004) (quoting *Harry S. Truman Mem'l Veterans Hosp., Columbia, Mo.*, 16 FLRA 944, 945 (1984)).
[8] Majority at 5 (emphasis omitted).
[9] *Id.* (emphasis omitted) (quoting *Dep't of Commerce, Nat'l Weather Serv., Wash., D.C.*, 86 FSIP 30, 32-33 (1986) (*Weather*)).
[10] *Id.* at 5.
[11] *Id.*
[12] *Weather*, 86 FSIP at 33.
[13] Majority at 5.
[14] Award at 17.
[15] *Id.* at 2.
[16] *Id.* at 17.
[17] *Id.*
[18] *Weather*, 86 FSIP at 33. Of course, either party has the statutory right to seek assistance from FMCS and FSIP. 5 U.S.C. § 7119; *see also U.S. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 533-34 & n.3 (1990) (finding that agency failed to bargain in good faith based, in part, upon its ground-rules proposal that union would waive its "statutory right to seek assistance" from FMCS and FSIP).
[19] *U.S. DHS, U.S. CBP, U.S. Border Patrol, Laredo, Tex.*, 71 FLRA 106, 110 (2019) (Dissenting Opinion of Member DuBester).
[20] Where a party claims that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo. In applying a de novo standard of review, the Authority assesses whether the Arbitrator's legal conclusions are consistent with the applicable standard of law. Under this standard, the Authority defers to the Arbitrator's underlying factual findings unless the excepting party establishes that they are nonfact. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

the parties' agreement in violation of § 7116(a)(1) and (5) of the Statute.[21] To determine whether a contract repudiation has occurred, the Authority considers (1) the nature and scope of the alleged breach of the agreement (i.e., was the breach clear and patent); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement).[22] The Authority has consistently held that the repudiation of an *entire agreement* violates §7116(a)(1) and (5) of the Statute.[23]

The Arbitrator concluded that, although the Agency violated the parties' agreement by terminating the entire agreement, it did not unlawfully repudiate the agreement because "all provisions of the CBA remain in effect to date."[24] On this point, he noted that the Union was still able to grieve the Agency's termination of the agreement.[25]

But this conclusion ignores the Agency's unequivocal declaration to the Union that it was terminating the parties' agreement.[26] The Agency never denied, rescinded, or even qualified its decision in this regard. In fact, it reiterated its unilateral declaration by communicating it to Agency employees and Congress.[27] The Agency's subsequent decision to participate in the grievance process, and its failure to immediately change other conditions of employment established by the parties' agreement, does not cure its improper termination of the agreement.

Accordingly, I would grant the Union's contrary-to-law exception, and would remand the award for action consistent with my dissent.

[21] 5 U.S.C. § 7116(a)(1), (5).
[22] *U.S. DOJ, Fed. BOP*, 68 FLRA 786, 788 (2015) (*DOJ*) (Member Pizzella dissenting in part).
[23] *See, e.g.*, *AFGE, AFL-CIO*, 21 FLRA 986, 988 (1986) ("the Authority has previously held that where a party repudiates a memorandum of understanding or an agreement in its entirety, such conduct is violative of the Statute") (citing *U.S. Patent & Trademark Office*, 18 FLRA 713 (1985); *Great Lakes Program Serv. Ctr., SSA, Dep't of HHS, Chi., Ill.*, 9 FLRA 499 (1982); *Veterans Admin. Hosp., Danville, Ill.*, 4 FLRA 432 (1980)); *see also DOJ*, 68 FLRA at 788 (citations omitted) (concluding that improper rejection of "an agreement in its entirety will always amount to a clear and patent breach that goes to the heart of the agreement").
[24] Award at 18.
[25] *Id.*
[26] Agency Exception, Union Ex. 19 at 1.
[27] Agency Exception, Union Ex. 18 at 1; Agency Exception, Union Ex. 21 at 1.