

**71 FLRA No. 123**

SOCIAL SECURITY ADMINISTRATION  
(Agency)

and

ASSOCIATION OF  
ADMINISTRATIVE LAW JUDGES  
INTERNATIONAL FEDERATION  
OF PROFESSIONAL  
AND TECHNICAL ENGINEERS  
(Union)

0-MC-0028

DECISION

March 31, 2020

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

**I. Statement of the Case**

During bargaining over their successor collective-bargaining agreement, the parties were unable to reach agreement on several articles, and the Agency requested the assistance of the Federal Service Impasses Panel (the Panel). After the Panel asserted jurisdiction over the dispute, the Union filed a motion asking the Authority to stay the Panel's assertion of jurisdiction. We deny the Union's request because the Union has not demonstrated that a stay is appropriate under the circumstances of this case.

**II. Background and Panel Proceedings**

While negotiating a successor collective-bargaining agreement, the parties were unable to reach an agreement on nine articles. On June 28, 2019, a commissioner with the Federal Mediation and Conciliation Service (FMCS) certified that the parties' negotiations were at impasse. On October 2, the Agency requested the Panel's assistance with respect to the issues certified at impasse.

The Union filed with the Panel objections to the Panel's assumption of jurisdiction over the parties' dispute on October 18, 2019. In support of its objections, the Union argued that the Panel lacked jurisdiction because: the Panel's members are not constitutionally appointed; the Panel's composition violates the

Federal Service Labor-Management Relations Statute (the Statute); and the parties are not at impasse.<sup>1</sup> The Agency filed a response to the Union's objections on October 30, 2019.

On January 9, 2020,<sup>2</sup> the Panel sent an email to the parties indicating that it was asserting jurisdiction "over the parties' successor [collective-bargaining agreement]."<sup>3</sup> Four days later, the Union filed the motion to stay that is now before us. In support of this motion, the Union argued that the Authority should enjoin the Panel from asserting jurisdiction over the parties' dispute for essentially the same reasons it asserted in its objections to the Panel.<sup>4</sup> On the same day, the Union notified the Panel that it had filed the motion with the Authority, and requested that the Panel "take no further action or require no further action from the parties until the Authority has ruled."<sup>5</sup>

In a January 16 email, the Panel informed the parties that it "will continue to retain jurisdiction over this case."<sup>6</sup> On the same date, the Union filed an amendment to its motion for stay.<sup>7</sup> On January 24, the Panel issued a letter to the parties, signed by its Chairman, notifying them of its determination that it was "assert[ing] jurisdiction" over the nine articles in dispute.<sup>8</sup> As part of this correspondence, the Panel directed the parties to submit written statements of position addressing the proposals by no later than February 7.

On January 27, the Authority issued a Notice and Order granting the Agency leave to file an opposition to the Union's motion for stay. The Agency filed its opposition on January 31.

**III. Analysis and Conclusions**

Section 7119(c)(1) of the Statute establishes the Panel "as an independent entity within the FLRA and commits the Panel the broad authority to make decisions to resolve negotiation impasses."<sup>9</sup> Panel decisions are

<sup>1</sup> Mot. for Stay (Mot.), Ex. 1 at 2-10, 23. The Union filed a supplemental objection to the Panel's jurisdiction on November 14, 2019. Mot. at 1.

<sup>2</sup> All dates hereafter occurred in 2020, unless otherwise noted.

<sup>3</sup> Opp'n Br., Ex. 2 at 1.

<sup>4</sup> Mot. at 1.

<sup>5</sup> Am. Mot., Ex. 1 at 1.

<sup>6</sup> *Id.* at 1, 3.

<sup>7</sup> In its amendment, the Union recounted its January 13 communication with the Panel and the Panel's January 16 response.

<sup>8</sup> Opp'n Br., Ex. 3 at 1.

<sup>9</sup> *IFPTE, Local 4*, 70 FLRA 20, 24 (2016) (*IFPTE*) (citing 5 U.S.C. § 7119(c)(1)).

“not directly reviewable by the Authority or the courts.”<sup>10</sup> Rather, parties may challenge a Panel order through other statutory procedures. Specifically, it is an unfair labor practice for an agency or a labor organization “to fail or refuse to cooperate in impasse procedures and impasse decisions.”<sup>11</sup> If a party fails or refuses to comply with a Panel order, and is consequently charged with an unfair labor practice, it may challenge the Panel’s jurisdiction as part of the ensuing proceedings.<sup>12</sup>

This conclusion is not affected by the Union’s assertion of constitutional challenges to the Panel’s jurisdiction, as these are issues that can be raised before the Authority through the same statutory proceedings.<sup>13</sup> And while the Authority is empowered to stay Panel decisions “in very narrow circumstances,”<sup>14</sup> it has “found, only once, that a stay of a Panel order was warranted.”<sup>15</sup> Citing our decision in that case – *NTEU*, 32 FLRA 1311 (1988) (*NTEU*)<sup>16</sup> – the Union asserts that “unusual circumstances” exist in the instant case warranting a stay” of the Panel’s assertion of jurisdiction.<sup>17</sup> But the circumstances giving rise to our decision in *NTEU* are materially different from those presented by the Union’s motion.

In *NTEU*, an agency requested that the Authority stay a Panel order directing the parties to submit their issues at impasse to interest arbitration for a binding decision.<sup>18</sup> The disputed proposals concerned

bargaining-unit employees’ wages and benefits,<sup>19</sup> and the parties had been actively litigating the negotiability of those proposals for several years.<sup>20</sup> Indeed, at the time of the agency’s request to stay the Panel’s order, two of the Authority’s negotiability decisions – involving the same parties and “substantively identical proposals” – were pending before the U.S. Court of Appeals for the District of Columbia Circuit.<sup>21</sup>

In assessing the agency’s request, the Authority determined that it was empowered to stay the Panel’s order pursuant to 5 U.S.C. § 705, which provides that “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”<sup>22</sup> The Authority also found that, because “the underlying issue is a matter in litigation, and is subject to the negotiability procedures developed for resolution of these matters,”<sup>23</sup> it was appropriate to stay further action by the Panel until the court issued its decision regarding the negotiability of the contested proposals.<sup>24</sup>

The Union’s request in the instant case is distinguishable from *NTEU* in two crucial respects. Unlike the request in *NTEU*, the Union is not asking the Authority to stay the Panel’s proceedings while the parties to the dispute litigate a court action that is potentially dispositive of their issues before the Panel. Indeed, as of the date that the Union filed its motion, no case related to the parties’ dispute before the Panel was pending between the parties in any judicial forum.<sup>25</sup>

<sup>10</sup> *Id.* (citing *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (*Brewer*)).

<sup>11</sup> 5 U.S.C. § 7116(a)(6), (b)(6).

<sup>12</sup> *Brewer*, 735 F.2d at 1500; see also *Dep’t of the Treasury v. FLRA*, 707 F.2d 574, 577 n.7 (D.C. Cir. 1983) (“Refusal to follow the Panel’s directive constitutes an unfair labor practice. The Panel’s decision is reviewable, first before the Authority, then in court, in an unfair labor practice proceeding,” (citations omitted)).

<sup>13</sup> See, e.g., *U.S. Dep’t of HHS, Gallup Indian Med. Ctr. Navajo Area Indian Health Serv.*, 60 FLRA 202, 213 n.7 (2004) (noting that “no precedent indicates that we are precluded from resolving constitutional issues”); *NTEU v. FLRA*, 986 F.2d 537, 540 (D.C. Cir. 1993) (“The Authority is prohibited only from disposing of a case upon constitutional rather than statutory grounds, not from taking into account the uncertain constitutionality of the Statute as interpreted one way but not another.”); *Council of Prison Locals v. Howlett*, 562 F. Supp. 849, 852 n.6 (D.D.C. 1983) (finding that the Authority had demonstrated its willingness to review “the constitutional and statutory validity of a Panel order”), *aff’d sub nom. Brewer*, 735 F.2d 1497; see also *Veterans Admin.*, 26 FLRA 264, 268-69 (1987) (concluding that Panel “did not err in asserting jurisdiction” over the parties’ dispute).

<sup>14</sup> *IFPTE*, 70 FLRA at 24.

<sup>15</sup> *Id.*

<sup>16</sup> 32 FLRA 1131 (1988).

<sup>17</sup> Mot. at 1.

<sup>18</sup> *NTEU*, 32 FLRA at 1131.

<sup>19</sup> *Id.* at 1131-32.

<sup>20</sup> *Id.* at 1138.

<sup>21</sup> *Id.* at 1138-39.

<sup>22</sup> *Id.* at 1136 (quoting 5 U.S.C. § 705).

<sup>23</sup> *Id.* at 1139.

<sup>24</sup> *Id.* (further concluding that a “requirement that the parties engage in interest arbitration during the same time that the negotiability of the same proposals involved in the interest arbitration is being litigated before the courts is inconsistent with the effective administration of the Statute”).

<sup>25</sup> While the Union notes in its motion that another union has challenged, through a pending federal court action, the Panel’s jurisdiction on grounds similar to those asserted by the Union, it specifically notes that its “claims in the instant case are related, but are separate and distinct from” the claims brought by the other union in its court action. Mot. at 2 (emphasis added). Member Abbott observes that, conversely, the Union goes on to note that its interest in the other union’s civil action has been recognized by that court, such that it has been granted permission to submit an amicus curiae brief in the other union’s action. *Id.*

And, unlike in *NTEU*, the Union is asking the Authority to stay further Panel proceedings “until such time as the *Authority* rules on the Union’s objection[s]” regarding the Panel’s jurisdiction.<sup>26</sup> But, as noted, Panel orders are not directly reviewable by the Authority. It necessarily follows that we cannot stay further proceedings by the Panel pending a ruling on objections that we are not empowered to make.

Accordingly, under the particular circumstances of this case, we find that the Union has failed to demonstrate that a stay of the Panel’s exercise of jurisdiction is appropriate.

#### **IV. Decision**

We deny the Union’s motion requesting that the Authority enjoin the Panel from asserting jurisdiction.

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<sup>26</sup> Mot. at 4 (emphasis added).