

71 FLRA No. 174

UNITED STATES
DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1106
(Union)

0-MC-0029

ORDER DENYING
MOTION FOR STAY

August 12, 2020

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

I. Statement of the Case

During bargaining over a successor collective-bargaining agreement, the parties failed to reach agreement on several articles, and the Agency requested the assistance of the Federal Service Impasses Panel (the Panel). After the Panel issued a decision and order, the Union filed a motion asking the Authority to stay the Panel's order. We deny the Union's request because the Union has not exhibited that a stay is appropriate under the circumstances of this case.

II. Background and Panel Proceedings

The parties failed to agree on eighteen articles while negotiating a successor collective-bargaining agreement, and the Agency requested Panel assistance. After resolving two of those articles in mediation, both parties submitted arguments on the remaining articles to the Panel. Before the Panel, the Union also contended that the Panel lacked jurisdiction. The Panel rejected that contention and issued *USDA*, resolving the sixteen disputed articles.¹

On June 2, 2020, the Union filed a motion to stay (the motion) the Panel's order. The Agency

requested leave to file, and did file, an opposition to the motion on June 8.²

III. Analysis and Conclusion: The Union has not demonstrated that a stay of the Panel's order is warranted.

Section 7119(c)(1) of the Federal Service Labor-Management Relations Statute (the Statute) establishes the Panel as "an entity within the Authority"³ and "authorizes [the Panel] to investigate 'promptly' any negotiation impasse and to 'take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.'"⁴ Panel orders are not directly reviewable by the Authority or the courts.⁵ Instead, the Statute provides an avenue for parties to challenge a Panel order. Specifically, it is an unfair labor practice (ULP) for an agency or a labor organization "to fail or refuse to cooperate in impasse procedures and impasse decisions."⁶ A party that fails or refuses to comply with a Panel order, and is consequently charged with a ULP, may then challenge the Panel's order.⁷

The Authority may find that "unusual circumstances" warrant a stay of a Panel order.⁸ In only two instances has the Authority found that a stay of a Panel order was warranted: *NTEU* and *SSA*. In *NTEU*, the Authority stayed a Panel order directing parties to interest arbitration while two of the Authority's negotiability decisions – involving the same parties and "substantively identical proposals" – were pending in federal district court.⁹ A stay was appropriate because interest arbitrators could not apply well-settled Authority precedent, as required by *Commander, Carswell Air Force Base, Texas*, until the federal district court resolved the pending appeals of the Authority's negotiability

² Because it is the Authority's practice to grant requests to file oppositions to motions to stay Panel orders, we grant the Agency's request and consider its opposition. See *SSA*, 71 FLRA 652, 652 (2020) (granting leave to file an opposition to a motion to stay a Panel order); *IFPTE, Local 4*, 70 FLRA 20, 20 (2016) (*IFPTE*) (same).

³ 5 U.S.C. § 7119(c)(1). Contrary to the concurrence, the Statute nowhere calls the Panel "independent" and, in fact, places it "within the Authority" and gives the Authority broad supervisory powers over the Panel's work. *NTEU*, 32 FLRA 1131, 1136-37 (1988) (*NTEU*) (citing 5 U.S.C. §§ 7105(a)(2)(I), 7101(b)).

⁴ *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (*Brewer*) (quoting 5 U.S.C. §§ 7119(c)(5)(A), (B)(iii)).

⁵ *Id.*

⁶ 5 U.S.C. § 7116(a)(6).

⁷ *Brewer*, 735 F.2d at 1500.

⁸ *NTEU*, 32 FLRA at 1139.

⁹ *Id.* at 1138-39.

¹ *USDA*, 20 FSIP 012 (2020).

decisions.¹⁰ Since *NTEU*, the Authority has applied its power to stay Panel orders “narrowly.”¹¹

In *SSA*, the Authority granted a stay of the Panel’s order where the Union was a direct party to pending litigation in federal district court arising from the same bargaining dispute before the Panel.¹² Because of the pendency of parallel proceedings in federal district court, the Authority found that implementing the Panel’s order at that time would not advance the purposes of the Statute.¹³

In both *NTEU* and *SSA*, the Authority held that unusual circumstances existed because the Panel’s order was intertwined with difficult legal issues pending judicial resolution.¹⁴ In both cases, the parties involved in the Panel proceedings were also involved in the dispute pending judicial resolution.¹⁵ Further, the Authority has looked to the “equities of the case” to determine whether a stay “would respect the statutory framework for the resolution of negotiability disputes” and “advance the purposes of the Statute.”¹⁶

The circumstances here are materially different from the two prior cases in which the Authority ordered a stay. Here, the Union argues that a stay is warranted until the federal district court resolves the dispute in *Ass’n of Administrative Law Judges v. FSIP (AALJ)*.¹⁷ In *AALJ*, a party objected to the Panel’s order by challenging the constitutionality of Panel appointments. But the Union fails to show how any difficult legal issues present in *AALJ* are intertwined with the Panel’s order here. The Union did not raise the constitutionality questions now pending litigation in *AALJ* during its own challenge to the Panel’s order. And unlike both *NTEU* and *SSA*, the Union here is not a party to the dispute pending judicial resolution. For these reasons, the Union fails to show that the Panel’s order is intertwined with difficult legal issues pending resolution.

The Authority has also looked to the “equities of the case” to determine whether a stay “would respect the statutory framework for the resolution of negotiability disputes” and “advance the purposes of

the Statute.”¹⁸ Here, the Union states that “implementing the Panel’s decision without first resolving the Panel’s lawful composition [would] be irreversible[.]”¹⁹ But, in its motion, the Union recognizes that the statutory framework provides an avenue for Authority review when, after failing or refusing to comply with a Panel order, a party is charged with a ULP.²⁰ The Union fails to argue why this avenue of relief is unsatisfactory. Further, granting the Union’s motion would widen a traditionally narrow Authority power by inviting parties outside of federal district court litigation to halt unrelated Panel orders. For these reasons, the Union fails to show that the “equities of the case” warrant a stay.²¹

IV. Decision

We deny the Union’s motion.

¹⁰ *Id.* at 1135-38; see also *Commander, Carswell Air Force Base, Texas*, 31 FLRA 620, 624 (1988) (*Carswell*) (requiring interest arbitrators to apply well-settled Authority precedent in duty to bargain issues).

¹¹ *IFPTE*, 70 FLRA at 24-26 (denying a motion to stay the Panel’s order); *NTEU* 63 FLRA 183, 187 (2009) (*NTEU II*) (same).

¹² 71 FLRA 763, 763 (2020) (*SSA*).

¹³ *Id.* at 763 (citing *NTEU*, 32 FLRA at 1139).

¹⁴ *SSA*, 71 FLRA at 763; *NTEU*, 32 FLRA at 1135-39.

¹⁵ *SSA*, 71 FLRA at 763; *NTEU*, 32 FLRA at 1135.

¹⁶ *NTEU II*, 63 FLRA at 186; *NTEU*, 32 FLRA at 1138-39.

¹⁷ Mot. for Stay (Mot.) at 1 (citing *Ass’n of Admin. Law Judges v. Fed. Serv. Impasses Panel*, No. 1:20-CV-1026).

¹⁸ *NTEU II*, 63 FLRA at 186; *NTEU*, 32 FLRA at 1138-39.

¹⁹ Mot. at 2.

²⁰ *Id.*

²¹ *IFPTE*, 70 FLRA at 25; *NTEU II*, 63 FLRA at 186.

Member DuBester, concurring:

Because the Union is not a party to the federal district court dispute giving rise to its request for stay, I agree that its request is properly denied.¹ However, I write separately to voice my concerns regarding the majority's inconsistent characterizations of the Federal Service Impasses Panel (the Panel).

Specifically, in a recent order granting sua sponte reconsideration of our denial of another union's request for a stay – an order from which I dissented – the majority described the Panel as an “entity within the Authority.”² This characterization differs from our original decision denying the union's request, in which we described the Panel as an “independent entity within the FLRA.”³ Nevertheless, in today's decision, the majority once again refers to the Panel as an “entity within the Authority.”⁴ I believe that our characterization of the Panel as an “independent entity within the Authority,” which is consistent with long-standing Authority precedent, is correct.⁵

But it is unclear to me why the majority has changed its view on this issue. Citing our decision in *NTEU*,⁶ the majority explains that the Statute “gives the Authority broad supervisory powers over the Panel's work.”⁷ But *NTEU* says nothing of the sort.

I would note, however, that the Authority's Chairman recently “updated” the Authority's organizational chart in a manner that appears to be directly related to this question. Notably, the press release announcing this “update” explains that the new chart “accurately reflects that the [Panel] ‘is an entity within the Authority.’”⁸ It further explains

that, “[c]onsistent with the Panel's placement within the Authority, the Statute confers upon the Authority *broad supervisory powers* over the Panel and its work,” and concludes that the updated chart “correctly reflects the Panel's role *under the Authority's leadership and supervision*.”⁹ Apart from a conclusory reference to § 7105(a) of the Statute, which generally describes the powers and duties of the Authority, the press release did not otherwise identify any authority for the sweeping changes it announced.

The question as to why the majority has changed its view regarding the Panel's “independence” remains, in my view unanswered. Nevertheless, as noted, because the Union is not a party to the federal district court dispute upon which it bases its request for a stay, I agree that its request is properly denied.

¹ SSA, 71 FLRA 652, 653 (2020) (*SSA I*) (finding that the Union failed to demonstrate that a stay of the Panel's exercise of jurisdiction is appropriate where “no case related to the parties' dispute before the Panel was pending between the parties in any judicial forum”), *recons. granted*, 71 FLRA 763 (2020) (*SSA II*) (Member DuBester dissenting).

² *SSA II*, 71 FLRA at 763.

³ *SSA I*, 71 FLRA at 652 (emphasis added).

⁴ Majority at 2.

⁵ See, e.g., *IFPTE, Local 4*, 70 FLRA 20, 24 (2016) (citing *NTEU*, 63 FLRA 183, 187 (2009) (concluding that “Section 7119(c)(1) of the Statute establishes the Panel as an independent entity within the FLRA” based upon its “broad authority to make decisions to resolve negotiation impasses” which are “not directly reviewable by the Authority”).

⁶ 32 FLRA 1131 (1988).

⁷ Majority at 2.

⁸ “FLRA Releases Updated Organizational Chart,” (June 2020), <https://www.flra.gov/system/files/webfm/FLRA%20Agency->

[wide/Public%20Affairs/Press%20Releases/Press%20Release%20-%20FLRA%20RELEASES%20UPDATED%20ORGANIZATIONAL%20CHART%206-29-2020.pdf](https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/Public%20Affairs/Press%20Releases/Press%20Release%20-%20FLRA%20RELEASES%20UPDATED%20ORGANIZATIONAL%20CHART%206-29-2020.pdf) (last visited August 10, 2020).

⁹ *Id.* (emphasis added).