

71 FLRA No. 188

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

FEDERAL COMMUNICATIONS COMMISSION
(Agency)

0-MC-0031

ORDER DENYING
MOTION FOR STAY

September 21, 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, the parties failed to reach agreement on several articles, and the Agency requested the assistance of the Federal Service Impasses Panel (the Panel). The Union filed a motion requesting that the Authority stay the Panel proceedings (the motion). 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

In early March 2020, the parties began substantive negotiations over six reopened articles from their basic negotiated agreement and one new article (the disputed articles). During bargaining, the parties also attempted to renegotiate several unopened articles that the Agency claimed were nonnegotiable (the unopened articles).

Due to the global COVID-19 pandemic, the parties bargained telephonically starting in mid-March 2020. On April 2, the Union filed an unfair-labor-practice (ULP) grievance alleging that the Agency violated the parties' ground-rules agreement by insisting on remote bargaining, as opposed to in-person negotiations. Despite the grievance, the parties continued to bargain telephonically. Then, on May 12, 2020, the Union filed a negotiability petition with the Authority over nine of the unopened articles.

Subsequently, the parties bargained with the assistance of a mediator. However, the parties were unable to reach an agreement, and, on May 22, 2020, the Agency requested Panel intervention. In its request, the Agency noted that the parties had reached impasse over all of the disputed articles and several of the unopened articles – including the nine involved in the Union's negotiability petition.

On May 26, 2020, the Union filed another grievance, alleging, among other things, that the Agency engaged in bad-faith bargaining by prematurely invoking the Panel's services.

The Panel asserted jurisdiction over the disputed articles and some of the unopened articles. However, the Panel refused to assert jurisdiction over the nine unopened articles involved in the negotiability petition pending Authority resolution.¹

Under the Panel's direction, the parties participated in additional mediation but were unable to reach a full agreement. Consequently, the Panel directed the parties to provide it with written submissions regarding the remaining articles.

On July 27, 2020, the Union filed a motion to stay the Panel proceedings.²

III. Analysis and Conclusion: The Union has not shown that a stay of the Panel proceedings 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 a 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

¹ Mot. at 5 (noting that the Panel "did not take jurisdiction over the issues currently before the [Authority] in the Union's negotiability petition").

² After receiving the Union's motion, the Authority granted the Agency leave to file a response. The Agency filed an opposition to the Union's motion on August 13, 2020.

³ 5 U.S.C. § 7119(c)(1).

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).

refuses to comply with a Panel order, and is consequently charged with a ULP, may then challenge the Panel's order.⁷

The Authority has repeatedly acknowledged that it is guided by the principle that administrative “tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.”⁸ In considering whether the equities of a case warrant staying a Panel order, the Authority has examined, among other things, whether granting or denying a stay would: advance the purposes of the Statute;⁹ be consistent with the requirements of an effective and efficient government;¹⁰ deprive the moving party of meaningful and adequate means of vindicating its positions;¹¹ and respect the statutory framework for the resolution of impasses and other types of disputes.¹² The Authority has applied the power to stay very “narrowly,”¹³ finding “unusual circumstances” warranting a stay in only two cases: *SSA* and *NTEU I*.¹⁴ In both of those cases, not only did the equities warrant a stay, but the parties at impasse were litigating difficult legal issues that were pending judicial resolution and intertwined with the Panel's assertion of jurisdiction.¹⁵

Here, the Union's two grievances and the pending negotiability dispute¹⁶ do not establish that there are any difficult legal issues pending judicial resolution that are intertwined with the Panel's assertion of jurisdiction. Thus, the “unusual circumstances” that existed in *SSA* and *NTEU I* are not present here, and it is unnecessary to address the Union's arguments regarding the equities of the case.¹⁷ Accordingly, we deny the motion.¹⁸

IV. Decision

We deny the Union's motion to stay.

⁷ *Brewer*, 735 F.2d at 1500.

⁸ *IFPTE, Local 4*, 70 FLRA 20, 24 (2016) (*IFPTE*); see also *Nat'l Weather Serv. Emps. Org.*, 71 FLRA 918, 919 (2020) (*NWSEO*) (Member DuBester dissenting) (“[A] moving party must exhibit more than the mere existence of a parallel proceeding pending judicial review” in order for the Authority to grant a stay.).

⁹ See *NWSEO*, 71 FLRA at 920; *NTEU*, 63 FLRA 183, 187 (2009) (*NTEU II*).

¹⁰ See *SSA*, 71 FLRA 763, 763 (2020) (*SSA*) (Member DuBester dissenting); *NTEU*, 32 FLRA 1131, 1136 (1988) (*NTEU I*).

¹¹ See *IFPTE*, 70 FLRA at 25; *NTEU II*, 63 FLRA at 187.

¹² See *NWSEO*, 71 FLRA at 919 (denying stay where granting would “interject the Authority prematurely into the carefully developed system of review”); *NTEU II*, 63 FLRA at 187 (denying stay where granting “would undermine the framework of the Statute for the resolution of impasses”); *NTEU I*, 32 FLRA at 1139 (granting stay where “implementation . . . of the Panel's orders . . . would likely only engender further administrative and judicial litigation”).

¹³ *IFPTE*, 70 FLRA at 24; see also *NTEU II*, 63 FLRA at 186 (noting that the Authority's various denials of motions to stay Panel orders “demonstrate how narrowly” it applies the power to stay).

¹⁴ See *SSA*, 71 FLRA at 763; *NTEU I*, 32 FLRA at 1139.

¹⁵ See *SSA*, 71 FLRA at 763 (parties litigating issue in federal district court); *NTEU I*, 32 FLRA at 1139 (two of the Authority's negotiability decisions – involving the same parties and “substantively identical proposals” to those at impasse – were pending before the U.S. Court of Appeals for the District of Columbia Circuit).

¹⁶ Mot. at 8.

¹⁷ See *NTEU II*, 63 FLRA at 187 (finding it unnecessary to address the moving party's “individual arguments” regarding equities because the “unusual circumstances” involved in *NTEU I* were not present, but concluding that those arguments “collectively fail[ed] to show how a stay would advance the purposes of the Statute and respect the statutory framework for the review of Panel orders”); *AFSCME, Council 26, Local 2830, AFL-CIO*, 59 FLRA 802, 802 (2004) (without addressing equities of case, summarily denying stay because existence of “three cases pending before other components” of the FLRA – including a ULP charge, a negotiability dispute, and a unit clarification – did not establish the type of “unusual circumstances” present in *NTEU I*); *U.S. Dep't of the Treasury and Customs Serv.*, 34 FLRA 137, 137 (1990) (without addressing equities of case, summarily denying stay because existence of ULP charge did not amount to “unusual circumstances” similar to those present in *NTEU I*). Although unnecessary, we note that the equities weigh in favor of denying the stay. It would be neither effective nor efficient to grant a stay “until the pending ULPs are prosecuted and until the negotiability petition is decided,” as the Union advocates. Mot. at 4. In fact, doing so would “interject the Authority prematurely into the carefully developed system of review.” *NTEU II*, 63 FLRA at 187. The ULP procedures of § 7118 of the Statute, the judicial review provisions of § 7123, and the negotiability provisions of § 7117(c) offer the Union the means of having all of its claims adjudicated.

¹⁸ See *IFPTE*, 70 FLRA at 25 (denying stay where moving party relied on two grievances, three ULP charges, an Occupational Safety and Health Administration complaint, and a Americans with Disabilities Act complaint).

Member DuBester, concurring:

I do not believe the Union has established the circumstances necessary to warrant a stay of the Federal Service Impasses Panel's proceedings. Accordingly, I concur in the Order denying the Union's motion.