

72 FLRA No. 14

**AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VA COUNCIL #53
(Union)**

and

**UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)**

MC-0032

ORDER DENYING MOTION FOR STAY

February 11, 2021

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

I. Statement of the Case

During the renegotiation of the parties' collective-bargaining agreement, the parties were unable to reach an agreement on several articles, and the Agency requested the assistance of the Federal Service Impasses Panel (FSIP). FSIP issued a decision and order, and the Union subsequently filed a motion requesting that the Authority stay FSIP'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 FSIP Decision and Order

During renegotiations of the parties' agreement in 2019, the Agency requested the assistance of FSIP on forty-three articles. FSIP asserted jurisdiction.¹ FSIP issued a decision and order resolving the parties' impasse in November 2020.²

On November 22, 2019, the Union had also filed

two negotiability petitions,³ and had filed twenty additional negotiability petitions on July 5, 2020.⁴ The Authority dismissed these negotiability petitions on November 20, 2020, and December 21, 2020, finding that there was no actual dispute between the parties concerning the legality of the proposals, and the conditions for a negotiability appeal had not been met.⁵

On November 10, 2020, the Union filed the instant motion requesting that the Authority stay FSIP's decision and order.⁶ The Authority issued an order granting the Agency leave to respond to the Union's motion,⁷ and the Agency filed a response to the Union's motion on November 30, 2020.⁸

III. Analysis and Conclusion: The Union has not shown that a stay of FSIP's decision and order is warranted.

Section 7119(c)(1) of the Federal Service Labor-Management Relations Statute (the Statute) establishes FSIP as "an entity within the Authority"⁹ and "authorizes [FSIP] to investigate 'promptly' any negotiation impasse and to 'take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.'"¹⁰ FSIP orders are not directly reviewable by the Authority or the courts.¹¹ However, the Statute provides an avenue for parties to challenge a FSIP order.¹² Specifically, the Statute instructs that 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."¹³ When a party fails or refuses to comply with a FSIP order, and is consequently charged with a ULP, it may then challenge FSIP's order.¹⁴

The Authority has continually recognized 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

³ *AFGE, Council 53, Nat'l VA Council*, 71 FLRA 1124 (2020) (*Council 53*) (Member Abbott dissenting) (case nos. 0-NG-3464 and 0-NG-3465).

⁴ *AFGE*, 71 FLRA 1196 (2020) (case nos. 0-NG-3499 through 0-NG-3518).

⁵ *See id.* at 1196; *Council 53*, 71 FLRA at 1124.

⁶ Mot. at 2.

⁷ Notice and Order at 1.

⁸ Resp. at 11.

⁹ 5 U.S.C. § 7119(c)(1).

¹⁰ *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)).

¹¹ *Id.*

¹² *NTEU*, 71 FLRA 962, 962 (2020) (then-Member DuBester concurring).

¹³ 5 U.S.C. § 7116(a)(6).

¹⁴ *Brewer*, 735 F.2d at 1500.

¹ In March 2020, the Union filed a complaint in the U.S. District Court for the District of Columbia concerning a constitutional challenge to the Presidential appointments of the current FSIP members. *Nat'l VA Council v. FSIP*, No. 1:20-cv-00837 (D.D.C. March 27, 2020). The Agency intervened in that case. The parties await the court's decision in that dispute.

² *U.S. Dep't of VA*, 20 FSIP 022 (2020).

equities of the case suggest that the status quo should be maintained.”¹⁵ In considering whether the equities of a case warrant issuing a stay, the Authority has examined, among other things, whether granting or denying a stay would: advance the purposes of the Statute; be consistent with the requirements of an effective and efficient government; deprive the moving party of meaningful and adequate means of vindicating its positions; and respect the statutory framework for the resolution of impasses and other types of disputes.¹⁶ The Authority has applied the power to stay very narrowly, finding “unusual circumstances” warranting a stay in only two cases: *SSA* and *NTEU*.¹⁷ As we recently recognized, “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 [FSIP’s] assertion of jurisdiction.”¹⁸

The Union makes two arguments in support of its motion. First, relying on a pending district court case challenging the composition of FSIP, the Union alleges that a stay is warranted because its pending litigation arises from the same dispute and is potentially dispositive of the parties’ dispute.¹⁹ While the Authority has granted a stay where parallel proceedings were pending in federal district court, the Authority has held that 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.²⁰ Specifically, the moving party must also show how the equities of a case suggest that a stay should be issued.²¹

Here, while the Union asserts that the pending litigation rises to the level of “unusual circumstances,”²² it fails to make any arguments to satisfy the equally necessary standard that the “equities of the case suggest that the status quo should be maintained.”²³ Moreover, the Authority recently addressed a similar motion to stay in *National Weather Service Employees Organization (National Weather Service)*.²⁴ There, we found that the union’s pending court challenge did not warrant a stay because it failed to show that the equities of the case suggested that the status quo should be maintained, and granting a stay would be inconsistent with the

requirements of an effective and efficient government.²⁵ Much like our decision in *National Weather Service*, to issue a stay of FSIP’s order without the Union demonstrating that the “equities of the case suggest that the status quo should be maintained” would be inconsistent with the requirements of an efficient government and would not advance the purposes of the Statute.²⁶

Second, the Union notes that it filed twenty-two negotiability petitions and argues that the status quo should be maintained because the petitions involve the same underlying issues and are subject to procedures that could result in a resolution of the matter.²⁷ However, the Authority has dismissed the Union’s negotiability petitions.²⁸ Further, even if the Union had pending negotiability petitions, the Authority has found that the existence of pending negotiability petitions – without more – does not rise to the Authority’s established standard for issuing a stay.²⁹

The dissent is once again advocating that the Authority reflexively stay a FSIP decision “whenever a party has filed a lawsuit in federal court collaterally attacking [FSIP’s] jurisdiction, regardless of the equities or any other conceivable circumstance.”³⁰ However, the Authority’s precedent makes clear that “no litigant is entitled to a stay.”³¹ Instead, stays are only granted where “the equities of the case suggest the status quo should be maintained.”³² As we noted in *National Weather Service*, the rule advocated by the dissent would disserve the Statute by charting a clear path for litigious parties to delay FSIP processes at will.³³

Because neither of the Union’s arguments establish the existence of “unusual circumstances” that warrant staying FSIP’s decision, we deny the Union’s motion.

IV. Decision

We deny the Union’s motion to stay.

¹⁵ *NTEU*, 71 FLRA at 963 (quoting *IFPTE, Local 4*, 70 FLRA 20, 24, (2016)).

¹⁶ *Id.*

¹⁷ *Id.* (citing *SSA*, 71 FLRA 763 (2020) (then-Member DuBester dissenting); *NTEU*, 32 FLRA 1131 (1988) (*NTEU I*)).

¹⁸ *Id.*

¹⁹ Mot. at 7.

²⁰ *Nat’l Weather Serv. Emps. Org.*, 71 FLRA 918, 919 (2020) (*Nat’l Weather Serv.*) (then-Member DuBester dissenting).

²¹ *Id.*

²² *NTEU*, 71 FLRA at 963.

²³ *Nat’l Weather Serv.*, 71 FLRA at 919.

²⁴ *Id.* at 918.

²⁵ *Id.* at 919.

²⁶ *See id.*; *see also NTEU*, 71 FLRA at 963.

²⁷ Mot. at 6.

²⁸ *See Council 53*, 71 FLRA at 1124-25 (dismissing 0-NG-3464 and 0-NG-3465 of the Union’s negotiability disputes); *see also AFGE*, 71 FLRA at 1196 (dismissing 0-NG-3499 through 0-NG-3518, which constitute the Union’s remaining negotiability disputes).

²⁹ *See NTEU*, 71 FLRA at 963 (denying the union’s motion for a stay and holding that the union’s pending negotiability dispute does not establish “unusual circumstances” or equitable arguments which warrant a stay).

³⁰ *Nat’l Weather Serv.*, 71 FLRA at 920.

³¹ *Id.*

³² *Id.* (citing *NTEU I*, 32 FLRA at 1339).

³³ *Id.*

Chairman DuBester, dissenting:

I disagree that the Union's motion for stay should be denied for the reasons articulated by the majority.

In addressing a similar request to stay a proceeding of the Federal Service Impasses Panel (Panel), the majority reconsidered its previous decision to deny the request,¹ and granted the request *sua sponte*, based *solely* on the fact that the union had subsequently filed a court action "that is potentially dispositive of the [parties'] issues before the Panel."² Indeed, the majority justified its subsequent issuance of the stay in *Social Security Administration (SSA II)* on grounds that "implementation of the Panel's order . . . 'would not advance the purposes of the Statute' due to the pendency of [the] parallel proceedings in federal district court."³

Here, the Union is a party to a pending court action that is potentially dispositive of the parties' dispute. Nevertheless, the majority denies the Union's request because it finds the Union has failed to "show how the equities of [the] case suggest that a stay should be issued."⁴ But the majority required no such additional showing as a condition of granting the stay in *SSA II*. And, more importantly, the majority has yet to explain precisely how a party might satisfy its inchoate standard.

In sum, the majority's rationale for denying the Union's motion to stay suffers from the same inconsistencies that I outlined in my dissent in *National Weather Service Employees Organization*.⁵ Despite the majority's repeated assertions, I have never "advocate[ed] that the Authority reflexively stay a Panel decision 'whenever a party has filed a lawsuit in federal court collaterally attacking the Panel's jurisdiction, regardless of the equities or any other conceivable circumstance.'"⁶ To the contrary, I *dissented* from the majority's conclusion in *SSA II* that the stay was properly granted based solely on the filing of the related federal court action.

Rather, my opposition to the majority's disposition of this and previous stay requests arises from

its continued failure to apply a consistent rationale in granting or denying these requests.⁷ Regrettably for our parties, it is apparent that the majority remains either unable or unwilling to address these concerns.

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*) (then-Member DuBester dissenting).

² *SSA II*, 71 FLRA at 763.

³ *Id.* (quoting *NTEU*, 32 FLRA 1131, 1139 (1988)).

⁴ Majority at 3.

⁵ 71 FLRA 918 (2020) (*Nat'l Weather Serv.*) (then-Member DuBester dissenting).

⁶ Majority at 4 (quoting *Nat'l Weather Serv.*, 71 FLRA at 920).

⁷ See, e.g., *Nat'l Weather Serv.*, 71 FLRA at 922 (Dissenting Opinion of then-Member DuBester) ("[t]he lingering question is why the majority did not follow its own precedent and grant the [u]nion's motion").