

72 FLRA No. 29

NATIONAL TREASURY EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES
(Agency)

0-AR-5565

DECISION

March 23, 2021

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

I. Statement of the Case

Arbitrator Robert A. Creo found that the Agency did not violate the parties' collective-bargaining agreement and §§ 7114(b)(5) or 7116(a)(1), (5), or (8) of the Federal Service Labor-Management Relations Statute (the Statute)¹ when it failed to execute a Bridge Program Memorandum of Understanding (MOU) between the parties. The Union filed exceptions to the award on contrary-to-law, nonfact, and essence grounds. Because the award is contrary to § 7114(b)(5) of the Statute, we grant the Union's contrary-to-law exception and modify the award to order the Agency to execute the Bridge Program MOU.

II. Background and Arbitrator's Award

In response to the Agency's realignment of its Office of Regulatory Affairs (ORA), the parties executed a Program Alignment MOU. The Program Alignment MOU required the Agency, "[w]ithin [ninety] days of implementation of the new organizational structure" to "begin working with NTEU to develop a Bridge Program for employees who would like to switch programs at some point in their career."²

Thereafter, the parties engaged in extensive negotiations which culminated in an agreement on a

Bridge Program MOU. The Bridge Program MOU states, in part, that the "Bridge Program will be implemented upon execution of this MOU" and that the "MOU shall become effective upon Agency[-h]ead [r]eview or within [thirty] calendar days of the date when fully executed by both parties, whichever occurs first."³

On September 17, 2018, the Union's bargaining representative sent an e-mail stating, in relevant part, "Glad that we were able to reach agreement on this. Thank you all for your hard work and patience through this long bargaining process. I will review the final, clean version of the MOU when it is ready and will sign ASAP."⁴ Two days later, an Agency representative replied, in relevant part, "On behalf of [the Agency bargaining representative], I am sending the attached ORA Bridge Program MOU for NTEU's review and signature. Once signed and returned, we will also sign and return the final version to this group for records."⁵

A few weeks after the Union returned the signed Bridge Program MOU, the Union's bargaining representative contacted the Agency's bargaining representative to request the final executed Bridge Program MOU. Receiving no response, on October 30, 2018, the Union's bargaining representative contacted several Agency representatives requesting a signed copy of the Bridge Program MOU. The next day, an Agency representative replied stating, "Thank you for your patience. I am working with [the Agency bargaining representative] to obtain final signature."⁶

On February 5, 2019, the Union's bargaining representative again contacted Agency management to question the delay in executing the Bridge Program MOU. Three days later, the Union filed a grievance alleging that the Agency committed an unfair labor practice by failing to execute the Bridge Program MOU and failing to negotiate in good faith. On March 1, 2019, at a grievance meeting, the Agency informed the Union for the first time that it did not intend to execute the Bridge Program MOU. On April 3, 2019, the Union invoked arbitration.

As relevant here, the Arbitrator framed the issue as: "Did the Agency violate either the [a]greement or the Statute, (5 U.S.C. [§§ 7114(b)(5); 7116(a)(1), (5)[,] and (8)) by failing to execute and implement the . . . Bridge Program MOU? If yes, what shall the remedy be?"⁷

¹ 5 U.S.C. §§ 7114(b)(5), 7116(a)(1), (5), (8).

² Award at 4 (quoting the Program Alignment MOU).

³ *Id.* at 5.

⁴ *Id.* at 6.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 13.

The Arbitrator found that “there is no question that in September 2018 both [p]arties reached a full understanding on all terms and conditions of a Bridge Program.”⁸ He further found that “[b]oth parties acknowledged by emails that there was a meeting of the minds and an understanding on all relevant issues raised by either [p]arty.”⁹

However, relying on language in the Bridge Program MOU, the Arbitrator “decline[d] to enforce an agreement based upon [§ 7114(b)(5) of the Statute] alone since the MOU itself required other steps, i.e. ‘a fully executed by both parties’ document, and then either, Agency[-h]ead [r]eview, or a passage of [thirty] calendar days.”¹⁰ The Arbitrator interpreted the Bridge Program MOU as containing language in “two places” that “expressly indicates that it must be executed by both [p]arties to be effective.”¹¹ Though the Arbitrator found that the “Agency reneged on the deal it made during the bargaining exchanges that was confirmed in writing by emails before being set forth in a formal document,”¹² he reasoned that the agreement was not final, enforceable, or binding until it was signed by both parties. Accordingly, the Arbitrator denied the grievance.

On November 13, 2019, the Union filed exceptions to the Arbitrator’s award, and the Agency filed an opposition to the Union’s exceptions on December 3, 2019.

III. Analysis and Conclusion: The award is contrary to law.

In its exceptions, the Union argues that the Arbitrator’s award is contrary to § 7114(b)(5) of the Statute.¹³ The Authority reviews the questions of law raised by the award and the Union’s exceptions de novo.¹⁴ In applying a standard of de novo review, the Authority assesses whether the Arbitrator’s legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings.¹⁵ In making that assessment, the Authority defers to the Arbitrator’s underlying factual findings unless the excepting party establishes that they are based on nonfacts.¹⁶

Under Section § 7116(a) of the Statute, an agency commits an unfair labor practice when it “refuse[s] to consult or negotiate in good faith with a labor organization as required by this chapter”¹⁷ or “fail[s] or refuse[s] to comply with any provision of this chapter.”¹⁸ And in defining the duty to negotiate in good faith, § 7114(b)(5) of the Statute requires either party, “if agreement is reached” during negotiations “to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.”¹⁹

Applying this provision, the Authority has found that an “agreement” is reached when authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining.²⁰ And it has consistently held that once authorized representatives have agreed to the terms of a

⁸ *Id.* at 25.

⁹ *Id.*

¹⁰ *Id.* at 26. The Arbitrator noted that the language in the “Introduction” section of the Bridge Program MOU states that “The ORA Bridge Program will be implemented upon execution of this MOU.” *Id.* at 25. He also noted that Item 8 of the Bridge Program MOU requires additional processes including Agency-head review before it is implemented. *Id.*

¹¹ *Id.* at 27.

¹² *Id.* at 26.

¹³ Exceptions Br. at 7-8, 10.

¹⁴ *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)).

¹⁵ *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998).

¹⁶ *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring) (citing *U.S. Dep’t of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).

¹⁷ 5 U.S.C. § 7116(a)(5).

¹⁸ *Id.* § 7116(a)(8).

¹⁹ *Id.* § 7114(b)(5); see *U.S. Dep’t of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 317 (1997).

²⁰ *Int’l Org. of Masters, Mates & Pilots*, 36 FLRA 555, 560 (1990) (*Masters*).

negotiated agreement, a party's failure to execute the agreement violates the Statute.²¹

Here, the Union argues that because the Arbitrator "expressly found that there was a meeting of the minds" regarding the Bridge Program MOU,²² the Agency's refusal to execute the MOU violates the Statute.²³ We agree.

The Arbitrator unequivocally found that the parties reached a meeting of the minds in September 2018, and that the Agency later "renege[d] on the deal."²⁴ However, he declined to find that the Agency violated the Statute, or to order it to execute the agreement, because he found that the Agency could not be bound by the agreement until additional steps – including Agency-head review and approval – were completed.²⁵

The Arbitrator's conclusion improperly conflates the parties' execution of their agreement with the agreement's implementation. It is certainly true that the Bridge Program MOU could not be implemented or enforced until the additional steps were taken. The Authority has recognized this principle in the context of

applying § 7114(c) of the Statute, which governs agency-head review of negotiated agreements.²⁶

But it does not follow that the Agency was absolved of its duty to execute the Bridge Program MOU once agreement was reached on its terms simply because the agreement could not be *implemented* until these additional steps were taken. Indeed, one of the terms to which the parties agreed in the MOU specifically *governed* the additional steps the parties would be required to take after its execution in order to implement and enforce the agreement.

Based upon the undisputed finding that the parties had reached agreement on the terms contained in the Bridge Program MOU,²⁷ we conclude that the Agency's failure to execute that agreement was contrary to § 7114(b)(5), and therefore violated § 7116(a)(5) and (8) of the Statute.²⁸ Accordingly, we find that the Arbitrator's contrary conclusion is contrary to law, and we grant the Union's exception.²⁹

IV. Decision

We grant the Union's contrary-to-law exception and modify the award to order the Agency to execute the Bridge Program MOU and submit it for agency-head review.

²¹ *U.S. DOD, Ill. Nat'l Guard, Springfield, Ill.*, 68 FLRA 199, 201 (2015) (*DOD*) (citing *Fort Bragg Ass'n of Teachers*, 44 FLRA 852, 857 (1992)) (the Authority "has recognized that the date of execution normally is the date [on which] the local parties sign the agreement" and "observed . . . that it is 'clear from the . . . language [of § 7114(b)(5)] that an imposition is placed upon a party to sign a document provided that an agreement is reached after negotiations thereon.'" (quoting *IRS, Phila. Dist. Off.*, 22 FLRA 245, 255 (1984) (judge's decision adopted by Authority) *overruled on other grounds sub nom. NTEU v. FLRA*, 793 F.2d 371 (D.C. Cir. 1986) (emphasis omitted)); *U.S. Dep't of the Treasury, BEP*, 44 FLRA 926, 938 (1992) (stating that under § 7114(b)(5), if an agreement is reached, the parties are obligated, on the request of any party to the negotiations, to execute a written document embodying the agreed terms); *U.S. Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 44 FLRA 205, 206 (1992) (same); see also *AFGE, AFL-CIO, Loc. 1815*, 69 FLRA 309, 309 (2016) (*Local 1815*) (adopting judge's conclusion that union violated § 7116(b)(5) and (8) of the Statute by refusing to execute an agreement at the end of negotiations); *Nat'l Council of SSA Field Operations Locs. – Council 220, AFGE, AFL-CIO*, 21 FLRA 319, 320 (1986) (*Council 220*) (upholding judge's finding that "as an authorized representative of the [union] negotiated and reached agreement, the [u]nion must be required to sign the written memorandum of understanding embodying the agreed upon terms" and concluding that the union "violated [§] 7116(b)(5) of the Statute by ordering its agent to refuse to execute a negotiated agreement").

²² Exceptions Br. at 7.

²³ *Id.*

²⁴ Award at 26.

²⁵ *Id.* at 27.

²⁶ See, e.g., *DOD*, 68 FLRA at 201 (citing *Masters*, 36 FLRA at 560-61) (explaining that until an agreement is executed, "there is not agreement to review under [§] 7114(c) or to otherwise implement").

²⁷ Although the Agency characterizes events differently than the Arbitrator, e.g., Opp'n at 8 (disputing that there was a "meeting of the minds"), the Agency did not file any nonfact exceptions. Thus, we defer to the Arbitrator's unchallenged factual findings in this regard. See, e.g., *USDA, U.S. Forest Serv., Law Enf't & Investigations*, 68 FLRA 90, 94 (2014) (in the absence of any nonfact exceptions, Authority defers to arbitrator's factual findings).

²⁸ See, e.g., *Local 1815*, 69 FLRA at 309; *Council 220*, 21 FLRA at 320.

²⁹ The Union also argues that the award fails to draw its essence from the parties' agreement and is based on a nonfact. Exceptions Br. at 8-9. Because we grant the Union's contrary-to-law exception, we find it unnecessary to address its remaining arguments. *U.S. Dep't of the Air Force, Luke Air Force Base, Ariz.*, 65 FLRA 820, 822 n.3 (2011) (citing *U.S. Dep't of Transp., FAA, Nashua, N.H.*, 65 FLRA 447, 450 n.3 (2011); *SSA*, 63 FLRA 313, 315 n.2 (2009)) (finding it unnecessary to address the agency's remaining exceptions after setting aside the award as contrary to law).

Member Abbott, concurring:

A basic tenet of contract law is that written agreements are preferred to oral agreements. Historical jurisprudence has borne itself witness to the many reasons why this is true. Countless numbers of disputes have resulted from bedeviling questions such as when a meeting of the minds occurs and what to do when an oral agreement allegedly conflicts with a written agreement.¹ It is not surprising then that far too many disputes of this sort end up in court. It is equally well-settled that a contract does not take effect until it is signed “on the dotted line” and that a party may not be forced to sign or enter into a written agreement.²

Section 7114(b)(5) of the Federal Service Labor-Management Relations Statute (the Statute) states:

The duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation . . . if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.³

The Authority’s interpretation of § 7114(b)(5) is problematic insofar as it punishes a party for not signing

¹ Restatement (Second) of Contracts § 210 cmt. b (1981) (“A document in the form of a written contract, signed by both parties and apparently complete on its face, may be decisive of the issue in the absence of credible contrary evidence. But a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties.”); see *Emerson v. Slater*, 63 U.S. 28, 41 (1859) (“Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to vary its terms, or to affect its construction. All such verbal agreements are considered as merged in the written contract. But oral agreements subsequently made, on a new and valuable consideration, and before the breach of the contract, in cases falling within the general rules of the common law, and not within the statute of frauds, stand upon a different footing.”).

² See *Duncan’s Heirs v. United States*, 32 U.S. 435, 448 (1833) (“The contract is incomplete, until all the parties contemplated to join in its execution affix their names to it, and while in this state, cannot be enforced against any one of them. The law presumes, that the party signing did so, upon the condition that the other obligors named in the instrument should sign it; and their failure to comply with their agreement gives him a right to retract.” (internal quotation marks omitted)); Restatement (Second) of Contracts § 177 cmt. b (1981) (“Where the required domination or relation is present, the contract is voidable if it was induced by any unfair persuasion on the part of the stronger party.”).

³ 5 U.S.C. § 7114(b)(5).

an agreement which appears to run counter to those basic tenets of contract law noted above. Here, the Arbitrator found that the Agency did not violate the Statute by rescinding the Bridge Program Memorandum of Understanding (MOU) because the Agency had not signed a written agreement.⁴ However, because the Agency does not challenge the Arbitrator’s finding that the parties had come to a verbal “meeting of the minds” regarding the Bridge Program MOU,⁵ I am constrained to agree with my colleagues that the Agency fails to establish that the award is not contrary to law.

I write separately to discuss my concerns with the implications of the Authority’s precedent on this matter and today’s decision and the intent of § 7114(b)(5).

The Arbitrator found that the Agency *agreed* to the Bridge Program MOU,⁶ but the Agency does *not agree* that it *agreed* to the MOU.⁷ While the Agency is certainly not required to file an exception to challenge this finding, the Arbitrator’s award undoubtedly puts the Agency in a precarious position. Where, as here, an award favors a party with its desired result, it is counterintuitive to expect, or fault, that party for not filing exceptions to that award.

The Arbitrator hit the mark when he stated that a contract is not *legally* binding until it is signed by both parties.⁸ The Authority’s interpretation of § 7114(b)(5) treats the execution of a collective-bargaining agreement (CBA) as a mere formality and, as a result, leads to murky disputes such as the case before us.⁹ That interpretation, however, seems to conflict with basic contract law and how it would apply in any other context. A party does not “agree” to “anything” and there is no meeting of the minds until the agreement has been signed by all parties, whether that be negotiating a CBA or buying a house.¹⁰ If agencies and unions may be bound to alleged oral agreements, then arbitrators and the Authority, in effect, dictate what final terms are in those agreements. This interpretation of § 7114(b)(5), as it has been applied, leads to murky disputes.

⁴ Award at 26.

⁵ *Id.* at 25 (“Both [p]arties acknowledged by emails that there was a meeting of the minds and an understanding on all relevant issues raised by either [p]arty.”).

⁶ *Id.*

⁷ Opp’n at 7.

⁸ Award at 26.

⁹ 5 U.S.C. § 7114(b)(5).

¹⁰ See, e.g., *Bullock v. United States*, 145 Fed. Cl. 403, 408 (Fed. Cl. 2019) (“An oral agreement is not binding, however, where the parties ‘did not intend to be bound until a written contract was signed.’”).

I find it unsettling that an arbitral remedy may force a party to sign an agreement it may never have agreed with, or may not agree with on the day it is forced to sign, and potentially face an unfair labor practice charge. Until the wording of § 7114(b)(5) is revisited, the Authority will be called upon to rescue the parties and arbitrators from these muddy waters.