73 FLRA No. 96

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL CITIZENSHIP
AND IMMIGRATION SERVICES
COUNCIL 119
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP
AND IMMIGRATION SERVICES
(Agency)

0-AR-5709

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DECISION

March 27, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The Union grieved the Agency's implementation of certain official-time limits set forth in an executive order that conflicted with the parties' existing collective-bargaining agreement. Arbitrator Daniel G. Zeiser issued an award denying the grievance. The Union filed exceptions alleging the award is contrary to the Federal Service Labor-Management Statute (the Statute). Because § 7116(a)(7) of the Statute[1] does not permit an agency to enforce a rule or regulation that conflicts with a collective-bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed, we find the award is contrary to law.

II. Background and Arbitrator's Award

The parties' agreement was in effect starting July 1, 2016 for a three-year term. Article 49 of the parties' agreement (Article 49) provides procedures under which either party could give notice – as the agreement approaches the expiration of its three-year term – that it wished to renegotiate. "In the event such notice is given[,]" and "[i]f negotiations are not completed by the anniversary date[,]" Article 49 states that "the [a]greement will be automatically extended until the new agreement is negotiated" (the continuance clause).[2] Pursuant to Article 49, in May 2019, the parties agreed to negotiate a successor agreement.

Meanwhile, in May 2018, President Trump issued Executive Order No. 13,837 (the executive order).[3] Addressing official time under § 7131 of the Statute,[4] Section 4(a) of the executive order (Section 4(a)) required agencies to schedule employees to "spend at least three-quarters of their paid time . . . each fiscal year[] performing agency business."[5]

In August 2018, the U.S. District Court for the District of Columbia (District Court) found Section 4(a) invalid and enjoined its implementation.[6] Then, in July 2019, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) reversed and vacated the District Court's ruling.[7] In October 2019, the D.C. Circuit Court issued a mandate to implement its July decision.[8]

In January 2020, while successor-agreement negotiations were ongoing, the Agency notified the Union that it would implement the executive order and, consequently, no employee could use more than 520 hours of official time per year. The Agency later refused the Union's demand to bargain over the executive order's implementation.

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[1] 5 U.S.C. § 7116(a)(7).
[2] Award at 7 (quoting Collective-Bargaining Agreement (CBA), Art. 49).
[3] Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use, Exec. Order No. 13,837 (May 25, 2018) (EO 13837), 83 Fed. Reg. 25,335 (June 1, 2018). After the Arbitrator issued his award, President Biden revoked EO 13837. Protecting the Federal Workforce, Exec. Order No. 14,003, § 3(b), 86 Fed. Reg. 7,231, 7,231 (Jan. 22, 2021).
[4] 5 U.S.C. § 7131.
[5] EO 13837, § 4(a)(ii)(1), 83 Fed. Reg. at 25,337; *see* Award at 11.
[6] *AFGE, AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 393 (D.D.C. 2018), *rev'd*, 929 F.3d 748 (D.C. Cir. 2019).
[7] *AFGE, AFL-CIO v. Trump*, 929 F.3d 748, 760-61 (2019).
[8] Court Mandate at 1, *AFGE, AFL-CIO v. Trump*, 929 F.3d 748 (D.C. Cir. 2019) (No. 18-5289) (Document No. 1809309, Filed Oct. 3, 2019); *see also* Memorandum on Executive Orders 13836, 13837, and 13839, 2019 DAILY COMP. PRES. DOC. 1 (Oct. 11, 2019), 84 Fed. Reg. 56,095 (Oct. 21, 2019) (Presidential Memo) (acknowledging that the "District Court's injunction barred enforcement of . . . [§] 4(a)" of the executive order and directing that this previously enjoined provision be implemented); OPM, Updated Guidance on Implementation of Executive Orders 13836, 13837, and 13839 (2019) (OPM Guidance), *available at* https://chcoc.gov/sites/default/files/Updated Guidance on Implementation of Executive Orders 13836 13837 and 13839.pdf ("[a]gencies should adhere to the now-effective provision[] of the" executive order that was previously enjoined).

The Union filed a grievance alleging the Agency repudiated Article 7 of the parties' agreement (Article 7), which concerned official-time allotments. The grievance also alleged the Agency violated Articles 2 (Article 2), 9 (Article 9), and 49 of the parties' agreement and the Statute by unlawfully implementing the executive order and by doing so without bargaining. The grievance proceeded to arbitration. The parties stipulated the issue was whether the Agency violated the parties' agreement when it partially implemented the executive order.

Citing Article 2 and § 7116(a)(7) of the Statute, the Arbitrator noted that the Agency could not implement the executive order if it conflicted with the parties' agreement. Both provisions essentially prohibit implementation of government-wide rules or regulations that conflict with the terms of a collective-bargaining agreement during the life of that agreement.[9] For purposes of these provisions, the Arbitrator treated the executive order as a government-wide rule or regulation. The Arbitrator then found that the executive order was issued on May 25, 2018 – during the original term of the parties' agreement – and that the parties' agreement "prevails over a later government[-]wide rule or regulation."[10] However, the Arbitrator found that this did not end the inquiry because of a then-recent Authority policy statement in *USDA, Office of the General Counsel* (*USDA*),[11] holding that government-wide regulations become effective "beginning the first day beyond the original expiration date of the agreement," even where the original agreement is extended by a continuance clause.[12]

The Arbitrator determined the agreement's original term was effective until July 1, 2019. When the parties executed ground rules for a successor agreement on May 23, 2019, the Arbitrator found that they triggered the operation of the continuance clause, meaning that once the agreement expired on July 1, it would continue in effect until the parties completed negotiations. Citing *USDA*,[13] the Arbitrator reasoned that "the bar on implementing the [executive o]rder would have lasted until July 1, 2019, when the express term of the [parties' a]greement ended and the extension began."[14] The Arbitrator determined that the Agency was prohibited from implementing the executive order on July 1, 2019, because the injunction was in effect and was not vacated until October 3, 2019. However, the Arbitrator also determined the Agency *could* implement the executive order once the court removed the injunction. The Arbitrator concluded the Agency did not violate the parties' agreement or the Statute when it implemented the executive order in January 2020.

Additionally, the Arbitrator found the executive order conflicted with Article 7's official-time provisions. However, because he found the Agency lawfully implemented the executive order, he concluded the Agency's changes to the Union's official-time allotments did not violate Article 7. The Arbitrator also determined the Agency did not violate Article 9 or the Statute by failing to bargain over the executive order's implementation.

The Union filed exceptions to the award on February 11, 2021, and the Agency filed an opposition on March 10, 2021.

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

The Union contends the award is contrary to law because § 7116(a)(7) of the Statute precluded the Agency from unilaterally implementing the executive order "during the express ... term of the [parties' a]greement, which remained in full force and effect until the parties negotiated the new agreement."[15] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[16] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[17] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[18]

Section 7116(a)(7) of the Statute makes it an unfair labor practice for an agency "to enforce any rule or regulation ... which is in conflict with any applicable collective[-]bargaining agreement if the agreement was in

[9] *See* Award at 3 ("Should any conflict arise in the administration of this [a]greement between the terms of this [a]greement and any government[-]wide rule or regulation . . . issued after the effective date of this [a]greement, the terms of this [a]greement will supersede and govern." (quoting CBA, Art. 2)); 5 U.S.C. § 7116(a)(7) (agencies may not "enforce any rule or regulation ... which is in conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed").

[10] Award at 27-28.

[11] 71 FLRA 986, 989 (2020) (Member DuBester dissenting). As discussed further below, the D.C. Circuit Court subsequently set aside the Authority's decision in *USDA*.

[12] Award at 28-29 (citing *USDA*, 71 FLRA at 989).

[13] 71 FLRA at 989.

[14] Award at 29-30.

[15] Exceptions Br. at 6.

[16] *U.S. Dep't of VA*, 72 FLRA 287, 289 n.21 (2021) (*VA*) (Member Abbott concurring) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

[17] *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).

[18] *AFGE, Loc. 3954*, 72 FLRA 403, 404 (2021) (Member Abbott concurring) (citing *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Ore.*, 68 FLRA 178, 180-81 (2015)).

effect before the date the rule or regulation was prescribed."[19] The Arbitrator found the executive order conflicted with Article 7's official-time provisions.[20] Therefore, the salient question is whether the agreement was in effect before Section 4(a) was prescribed.

As noted, the Arbitrator found that, due to Article 49's continuance clause, the three-year term of the parties' agreement was extended effective on July 1, 2019, "until a new agreement was negotiated."[21] On this basis, and relying on *USDA*, the Arbitrator concluded the continuance clause began a new term of the agreement, allowing the Agency to implement the executive order. However, after the Arbitrator issued his award, the D.C. Circuit Court reversed *USDA*. In *NTEU v. FLRA* (*NTEU*),[22] the D.C. Circuit Court held, "[b]ecause the invocation of a continuance clause extends a collective[-]bargaining agreement pending negotiations over its successor, the existing agreement remains 'in effect' until a new agreement is in place."[23] Applying this principle to § 7116(a)(7), the court explained that "so long as [the agreement] remains in effect, the employing agency may not enforce new regulations that conflict with it."[24]

Here, the executive order was issued in May 2018, and the District Court enjoined Section 4(a)'s implementation in August 2018. Both of these actions occurred during the original term of the parties' agreement. Although the District Court's decision imposing the injunction was later reversed, and the injunction was lifted, *those* actions occurred *after* the parties invoked the agreement's continuance clause, which extended the term of the parties' agreement. Therefore, for § 7116(a)(7) purposes, the parties' agreement was "in effect before the date" the executive order was "prescribed" – regardless of whether it was "prescribed" in May 2018 or after the injunction was lifted in 2019.[25]

The Authority previously has held that § 7116(a)(7) precluded an agency from enforcing the executive order where it conflicted with an extended agreement's provisions.[26] Although the Arbitrator relied on *USDA* to reach a contrary conclusion,[27] the Authority has repeatedly held that it "resolves arbitration cases based on the state of the law at the time that it decides those cases,"[28] absent "manifest injustice or statutory direction or legislative history to the contrary."[29] In this case, we can perceive no manifest injustice, statutory direction, or legislative history that would prevent us from applying *NTEU* to the Union's exception.[30] Therefore, we apply *NTEU* and, for the reasons stated above, conclude § 7116(a)(7) prohibited the Agency from enforcing the executive order while the parties' extended agreement was in effect.

Accordingly, we grant the Union's contrary-to-law exception. We remand the matter to the parties for resubmission to the Arbitrator, absent settlement, for further proceedings consistent with the analysis in this decision.[31]

IV. Decision

We grant the Union's contrary-to-law exception and remand the matter to the parties for further proceedings, absent settlement.

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[19] 5 U.S.C. § 7116(a)(7).
[20] Award at 31.
[21] *Id.* at 29.
[22] 45 F.4th 121 (D.C. Cir. 2022).
[23] *Id.* at 126-27 (quoting 5 U.S.C. § 7116(a)(7)).
[24] *Id.* at 126.
[25] 5 U.S.C. § 7116(a)(7).
[26] *VA*, 72 FLRA at 289-91 (upholding arbitrator's finding that, under continuance clause's plain wording, extended agreement was in effect before the President issued the executive order, and § 7116(a)(7) therefore prohibited immediate enforcement of executive order where it conflicted with provisions of extended agreement); *id.* at 290 n.31 ("[B]ased upon [§§] 7116(a)(7) and 7117(a)(1)[,] . . . *once a collective[-]bargaining agreement becomes effective*, subsequently issued rules or regulations . . . cannot nullify the terms of such a collective[-]bargaining agreement." (quoting *NTEU*, 14 FLRA 243, 245 (1984) (emphasis added))).
[27] Award at 28-29 (citing *USDA*, 71 FLRA at 989).
[28] *NLRB*, 72 FLRA 334, 337 n.41 (2021) (quoting *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 183, 184 (2019) (Member DuBester dissenting)).
[29] *U.S. Dep't of the Army, U.S. Army Rsrv. Pers. Ctr., St. Louis, Mo.*, 49 FLRA 902, 903 (1994) ("it is a commonly accepted principle of administrative law that, absent manifest injustice or statutory direction or legislative history to the contrary, an administrative agency must apply the law in effect at the time a decision is made, even when that law has changed during the course of a proceeding" (citations omitted) (internal quotation marks omitted)).
[30] *See, e.g.*, *U.S. Dep't of HHS, SSA, Kan. City, Mo.*, 38 FLRA 1480, 1484 (1991) (rejecting argument that Authority should not have applied revised standard to exceptions because "an agency's ability to revise approaches on particular issues is an essential component of the administrative decisionmaking process").
[31] The Union also argues: (1) the Arbitrator's finding that the Agency lawfully enforced the executive order fails to draw its essence from the parties' agreement, Exceptions Br. at 7 n.1; and (2) the Arbitrator's finding that the Agency did not have to bargain over the executive order's impact and implementation is contrary to law, *id.* at 11-12. Both exceptions are based on the Arbitrator's determination that the Agency lawfully implemented the executive order. As we set aside that determination, it is unnecessary to address these exceptions. *See, e.g.*, *U.S. DOL, Bureau of Lab. Stat.*, 66 FLRA 282, 284 n.5 (2011) (finding it unnecessary to address agency's remaining exceptions after setting aside award as contrary to law).