OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE & U.S.

IMMIGRATION AND NATURALIZATION

SERVICE

Respondents

and Case No. WA-CA-20422

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, AFL-CIO, NATIONAL BORDER PATROL COUNCIL

Charging Party/Union

Scott D. Cooper

Counsel for the Respondents

David Rodriguez

Representative of the Charging Party

Ana de la Torre

Bruce D. Rosenstein (On the Brief)

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that, on November 6, 1991, the U.S. Court of Appeals for the District of Columbia Circuit dismissed the Respondents' appeal of the Authority's Decision and Order in U.S. Department of Justice and Immigration and Naturalization Service, 37 FLRA 1346 (1990); that, on January 2, 1992, the Union, citing the Circuit Court's dismissal and the Union's withdrawal of the contractual provision the Authority found to be non-negotiable, requested that the Respondent INS-Union collective bargaining agreement be implemented; and that, by letter dated January 27, 1992, Respondent INS refused to implement the parties' collective bargaining agreement, stating that the Circuit Court's dismissal of the Respondent's appeal did not require that Respondent INS implement the INS-Union collective bargaining agreement. The complaint alleges that by such conduct Respondent INS has failed and refused to negotiate in good faith with the Union and has thereby engaged in unfair labor practices in violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5).[(1)]

Respondent's answer admitted the allegations as to the Respondent, the Union, and the charge, but denied any violation of the Statute.

A hearing was held in Washington, D.C.[(2)] The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The parties filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The background of this case has been set forth in the following prior decisions or orders: United States Department of Justice, Immigration and Naturalization Service and American Federation of Government Employees, National Border Patrol Council, 31 FLRA 1123 (1988) (Immigration and Natural-ization Service), American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, 31 FLRA 1193 (1988) (Department of Justice), United States Department of Justice, Immigration and Naturalization Service and American Federation of Government Employees, National Border Patrol Council, 32 FLRA 89 (1988), and U.S. Department of Justice and Immigration and Naturalization Service and American Federation of Government Employees, National Border Patrol Council, 37 FLRA 1346 (1990) (INS), request for reconsideration denied, 38 FLRA 946 (1990), petition for review dismissed sub nom. U.S. Department of Justice, Immigration and Naturalization Service v. FLRA, No. 90-1613 (D.C. Cir. Nov. 6, 1991). The parties differ concerning the continuing validity and interpretation of some of these decisions, as they are vitally important to the disposition of this case.

On September 25, 1987, Arbitrator Ira Jaffe issued an interest arbitration opinion and award in which he resolved an impasse regarding the provisions to be included in a new master labor agreement to replace the parties' September 30, 1976 agreement. The award "direct[ed] that the Parties include . . . in their new Agreement" some 39 specific articles, an appendix, and various side letters and memoranda. The Arbitrator referenced these items from the parties' submissions, but did not include their full text. (Joint Exh. 2A at 81-83; Tr. 49).

The parties did not execute a written document embodying the terms of the award and did not agree to the manner of its implementation or an effective date. (Tr. 49-50).

The Department of Justice conducted an agency head review of the award on October 23, 1987 pursuant to section 7114(c) of the Statute and disapproved 18 provisions as being outside the duty to bargain. (Joint Exh. 2B).

The Authority dismissed the Union's petition for review of the negotiability of the disapproved provisions (Case No. 0-NG-1480) in Department of Justice, 31 FLRA 1193. The Authority relied on its decision in Department of Defense Dependents Schools (Alexandria, Virginia), 27 FLRA 586 (1987), which was later reversed and remanded in Department of Defense Dependents Schools v. FLRA, 852 F.2d 779 (4th Cir. 1988) (DODDS), for the conclusion that the agency head was not empowered to review provisions that were directed to be included in the collective bargaining agreement as a result of interest arbitration; that the appropriate mechanism for challenging the propriety of an interest arbitration award was through the filing of exceptions under section 7122(a) of the Statute. Therefore, the Authority concluded that, as the agency head's disapproval did not serve as an allegation of non-negotiability, there was no basis on which the Union could file a petition for review. 31 FLRA at 1195-96.

Both parties had filed exceptions to the award under section 7122(a), the action which the Authority had held in DODDS should be taken to challenge the propriety of an interest arbitration award. However, Respondent INS' exceptions were filed only with respect to seven of the provisions which it had been ordered to adopt while the agency head (DOJ) had disapproved provisions of six additional articles of the agreement. 31 FLRA at 1194-95.

The Authority in Immigration and Naturalization Service, 31 FLRA 1123, ruled on the exceptions, rejecting Respondent INS' argument that the Authority lacked jurisdiction to entertain exceptions to interest arbitration awards under section 7122(a). 31 FLRA at 1125. The Authority concluded that most of the excepted-to provisions were consistent with law and regulation. The Authority did strike the disputed portions of Article 31, Section B and Article 32, Section, A, B. and F.5., and ordered the parties to resume bargaining over Article 32. 31 FLRA at 1140.

After the parties finished renegotiating Article 32, the agency head disappproved Section B of that Article. The Union then filed an unfair labor practice charge in Case 3-CA-90347. On May 31, 1989, a complaint was issued alleging that INS violated section 7116(a)(1) and (5) of the Statute by refusing to implement the collective bargaining agreement and that DOJ had unlawfully interfered with the collective bargaining relationship between INS and the Union when it disapproved Article 32.B. (Joint Exh. 3A).

On October 30, 1990, the Authority issued its decision in the case, DOJ, 37 FLRA 1346. (Joint Exh. 3B). The Authority held that it would no longer follow prior Authority decisions that limited the right of an agency head to conduct a review under section 7114(c) where interest arbitration resulted from parties having sought Panel assistance under section 7119(b)(1); that interest arbitration directed by the Panel under section 7119(b)(1) of the Statute does not constitute binding arbitration to which exceptions can be filed under section 7122(a); that agency heads retain the authority to review provisions imposed as a result of Panel directed interest arbitration; and that where the agency head reviews and disapproves such Panel ordered interest

arbitration awards, such provisions are subject to challenge on the same bases as other Panel decisions rendered pursuant to section 7119 of the Statute, that is, either through the negotiability procedures of section 7117 of the Statute or through the unfair labor practice procedures established in section 7118 of the Statute. 37 FLRA at 1358-59.

The Authority then proceeded to apply these principles to the case and found that DOJ had not violated the Statute by disapproving, in January 1989, Article 32.B., which was found to be inconsistent with the Privacy Act . The Authority also concluded that INS had not violated the Statute by refusing to implement the agreement, because there was no agreement in effect as a result of the disapproval, and the parties had not agreed to implement portions of the agreement that were not disapproved. The Authority then went on to discuss the status of the parties' agreement, as follows, 37 FLRA at 1368-69:

3. Status of Parties' Agreement

One additional claim made by the Respondents must be addressed.

The Respondents claim that the agency head's disapproval of October 23, 1987, is still valid as to the provisions which were not ruled on by the Authority in either Immigration and Naturalization Service or Department of Justice. Respondent's Brief at 53. More specifically, the Respondents indicate that there were provisions disapproved by the agency head, which were not excepted to, but concerning which the Union sought review through the filing of a petition for review. When the Authority dismissed the petition in Department of Justice, the Respondents contend, the Authority left unresolved the negotiability of those provisions.

Assuming that the Respondents are correct and that there were provisions in Department of Justice that were disapproved by the agency head but not addressed by the Authority in Immigration and Naturalization Service, neither the General Counsel nor the Union argues here that those matters are still in dispute. In fact, one of the underlying bases of the unfair labor practice complaint is the alleged failure to implement the agreement in January 1989. Thus, both the General Counsel and the Union maintain that the agreement was a final document as of January 1989; neither the General Counsel nor the Union assert that any matters remain unresolved.

Based on the record of this case, therefore, we find no evidence to indicate that the provisions referenced by the Respondents as still being in dispute are, in fact, in dispute. Consequently, the Respondents' contention that portions of its October 23, 1987, disapproval are still valid, is without merit.

As Article 32, Section B was the only provision in dispute and, as we have now resolved its negotiability, there are no outstanding issues in this proceeding which need to be addressed. We are mindful of the fact that, as noted by the Union, the parties have been unable to conclude a collective bargaining agreement to replace the previous one negotiated in 1976. It is now within the parties' prerogative to determine what action they wish to take that will

> culminate in a collective bargaining agreement. For example, insofar as Article 32, Section B was found to be properly disapproved, the Union may seek to renegotiate the provision, consistent with this decision. On the other hand, the Union may decide not to seek renegotiations, in which case there is no remaining impediment to implementation of the parties' agreement. The manner of implementation, as well as the effective date of the agreement, is within the purview of the parties. It is our sincere desire that the parties will act expeditiously in finalizing their agreement.

On November 9, 1990, Respondents filed a request for reconsideration with the Authority.

On November 21, 1990, the Union advised INS that it was withdrawing 32.B. from the negotiations and that "it is our position that the subject collective bargaining agreement is effective as of this date. Please provide me your position concerning the effective date. . . ." (Joint Exh. 4(B)).

On December 12, 1990, INS advised the Union that the Authority's decision in 37 FLRA 1346 was not an order placing the Jaffe contract award in effect and, in any case, the request for reconsideration effectively prevented the decision from becoming final and binding. (Joint Exh. 5).

On December 14, 1990, the Authority denied Respondents' request for reconsideration. INS, 38 FLRA 946. The Authority also denied Respondents' request that it reinstate the Union's petition for review of the negotiability of part of the October 23, 1987 disapproved provisions (Case No. 0-NG-1480) which it had dismissed in Department of Justice, 31 FLRA 1193. The Authority noted that only a union may file a petition for review under section 7117 and here the Union did not desire such reinstatement. 38 FLRA at 950.

On January 17, 1991, the Union wrote to INS referring to the denial of reconsideration and repeating its position that the effective date of the agreement ordered by the Jaffe award was November 21, 1990. The Union requested INS' position. (Joint Exh. 6).

On February 1, 1991, INS advised the Union that its position was that the Jaffe agreement had never become effective. INS noted that the Authority decision had been timely appealed. INS also requested clarification as to whether the agreement to which the Union referred was the complete Jaffe agreement minus only Section B of Article 32 or whether there were some other provisions among those disapproved in October 1987 which the Union also no longer disputed. (Joint Exh. 7).

On March 11, 1991, the Union advised INS that "it is our position that the contract is effective as directed by the Jaffe Award and modified pursuant to the . . . Authority's decisions on exception and on the stipulated unfair labor practice charge. Additionally, Article 32, Section B is, as we previously advised you, withdrawn from this contract." (Joint Exh. 8). On March 21, 1991 the Union further advised INS, in part, as follows (Joint Exh. 9):

> In order to obtain implementation, AFGE requests that the parties implement an agreement consisting of: the Jaffe award, modified pursuant to 31 FLRA No. 94 and 37 FLRA No. 111 (i.e., without Section 32.B), and without the provisions which were the subject of O-NG-1480

> but were not also addressed in 31 FLRA NO. 94 (i.e., those shown in the attached Appendix). This request does not waive any AFGE rights to pursue implementation of Section 32.B. and the provisions identified in the Appendix. AFGE intends to pursue implementation of those provisions through other appropriate procedures at the earliest possible moment.
>
> Inasmuch as the above request for implementation disposes of all disputed provisions, there is no impediment to immediate implementation. To allow for collation and proof-reading, we are agreeable to a grace period to end not later than March 28, 1991, which will be the actual effective date. Please contact this office to arrange for the signing of the above-described agreement.

On April 2 and 4, 1991, INS reminded the Union that the most recent Authority decision was still on appeal. INS also stated that the agency head review conducted in 1987 had not been resolved through the various cases and remained effective as a bar to implementation of the Jaffe agreement. (Joint Exh. 11).

On May 20, 1991, the Union filed an unfair labor practice charge in which it alleged that the Authority's decision in 37 FLRA 1346 had removed all remaining impediments to implementing the Jaffe award, and that INS had, since the Union's first demand on November 21, 1990 to implement that decision, been violating sections 7116(a)(1), (5), and (8) by refusing to implement the agreement. (Joint Exh. 12). The Washington Region dismissed the charge based on the then pending appeal in INS, 37 FLRA 1346. (Joint Exh. 13). The Union sought review of the Regional Director's decision, but ultimately withdrew the charge following the Court's decision in that case. (Joint Exhs. 14, 19, 21).

On May 9, 1991, the Solicitor of the Authority took the position before the United States Court of Appeals for the District of Columbia Circuit in United States Department of Justice, Immigration and Naturalization Service v. Federal Labor Relations Authority, (No. 90-1613) that in INS, 37 FLRA 1346,

> [T]he Authority's decision did not require the agency to take any affirmative action, nor did it cause any direct injury to petitioner. The Authority neither addressed the validity of the 1987 agency head disapproval nor directed the parties to implement any specific contract provisions. Accordingly, petitioner is not aggrieved within the meaning of section 7123(a) of the Statute. (Joint Exh. 22 at 9).

On November 6, 1991, the Court dismissed Respondents' petition for review, finding that INS was not aggrieved by the Authority's order. The Court stated, in part, as follows:

> INS has not been required to engage in any affirmative act, nor has the FLRA's order caused any direct injury to INS. Furthermore, INS is not precluded from judicial review of an unfavorable FLRA decision in a future unfair labor practice proceeding. (Joint Exh. 15).

On January 2, 1992, the Union sent a letter to INS referencing the Court's dismissal of the appeal. The Union also stated:

> Thus, AFGE maintains its position that implementa-tion of the contract between the National Border Patrol Council and the Border Patrol was mandatory following removal of the

provision that was held to be non-negotiable in 37 FLRA [1346] No. 111 .

> Notwithstanding our right to implementation of the contract following the Authority's decision in the above case, I am again demanding that the contract be implemented now that the Department's appeal has been dismissed thereby concluding the years of endless litigation surrounding this contract. (Joint Exh. 17).

On January 27, 1992, INS replied to this letter, stating, in part, as follows:

> The Order issued by the D.C. Circuit which dismissed the Department's petition stated that no affirmative action was required by the Service in this matter and the Solicitor of the FLRA pointed out to the Court that the Authority's statements concerning implementation of the disputed contract were merely dicta. In any case, we do not believe that implementation of the 1987 contract is mandatory. The legal issues presented by the Department in their petition remain unresolved.
>
> As opposed to continuing this unnecessary dispute, we would like to suggest that the parties consider preparing for and entering into negotiation of a new agreement to replace the 1976 contract between the parties. (Joint Exh. 18).

On February 5, 1992, the Union responded to the INS, in part, as follows:

> [T]he nature of the support AFGE will be able to provide to your referenced desire to improve the relationship cannot be to renegotiate the contract except in accordance with its express provisions, i.e., near the end of its term. We continue to demand its immediate implementation. (Joint Exh. 20.)

On March 4, 1992, the Union filed the unfair labor practice charge which forms the basis for the complaint issued in this case. The charge described the alleged offense committed by Respondents as follows:

> At all times after November 21, 1990, the labor organization has demanded implementation of a collective bargaining agreement. Charged Party and Charged Activity have refused to implement such agreement.
>
> In 37 FLRA [1346] No. 111, the Federal Labor Relations Authority identified only one provision, section 32.B., as posing an obstacle to implementation of the agreement. On November 21, 1990, AFGE withdrew that section. Charged Party and Charged Activity have been notified of dismissal of their appeal to court of 37 FLRA [1346] No. 111, and the time period for appeal of that dismissal has lapsed without further action by them. (G.C. Exh. 1(a)).

Discussion and Conclusions

As noted, the remaining portions of the unfair labor practice complaint allege that, on November 6, 1991,

the U.S. Court of Appeals for the District of Columbia Circuit dismissed the Respondents' appeal of the Authority's Decision and Order in U.S. Department of Justice and Immigration and Naturalization Service, 37 FLRA 1346 (1990); that, on January 2, 1992, the Union, citing the Circuit Court's dismissal and the Union's withdrawal of the contractual provision the Authority found to be non-negotiable, requested that the Respondent INS-Union collective bargaining agreement be implemented; and that, by letter dated January 27, 1992, Respondent INS refused to implement the parties' collective bargaining agreement, stating that the Circuit Court's dismissal of the Respondent's appeal did not require that Respondent INS implement the INS-Union collective bargaining agreement. The complaint alleges that by such conduct Respondent INS has failed and refused to negotiate in good faith with the Union and has thereby engaged in unfair labor practices in violation of section 7116(a)(1) and (5) of the Statute.

The General Counsel's position is that having withdrawn all sections of the collective bargaining agreement that Respondent INS and Respondent DOJ have objected to, there is no remaining impediment to implementation of those remaining portions which constitute the parties' entire collective bargaining agreement. The General Counsel claims that the continued refusal of Respondent INS, as evidenced in its January 27, 1992 letter, to implement the parties' collective bargaining agreement, warrants the finding of a section 7116(a)(1) and (5) violation of the Statute. Contrary to Respondent's arguments that the charge is untimely or that the case is barred by the principle of issue preclusion, the General Counsel asserts that the March 4, 1992 charge was timely under the Statute and that Respondent INS' January 27, 1992 refusal to implement the parties' collective bargaining agreement is based on new conduct not previously raised or adjudicated in any prior unfair labor practice charge or complaint.

Respondent defends on the basis that (1) the Authority's decision in INS, 37 FLRA 1346, did not require INS to implement the Jaffe award once the Union had withdrawn Article 32.B., (2) the Union's January 2, 1992 demand was to implement all of the Jaffe award, minus only Article 32.B -- it did not state that the Union had withdrawn any other provisions; (3) INS' January 27, 1992 refusal to accede to the Union's demand to implement would have been warranted even if the Union had withdrawn the provisions that were never reviewed; (4) the unfair labor practice charge was untimely filed; moreover, even if the January 2, 1992 demand to implement merely repeated an offer made by the Union on March 21, 1991, the unfair labor practice charge would still have been untimely filed; and (5) the complaint is barred by the principle of issue preclusion.

I agree with the General Counsel that the complaint is not barred by section 7118(a)(4)(A) of the Statute as being based on an alleged unfair labor practice which occurred more than six months before the filing of the charge with the Authority. The alleged unfair labor practice is Respondent's failure to implement the agreement on January 27, 1992 following the Court's dismissal of Respondent's appeal on November 6, 1991 and the Union's request for implementation on January 2, 1992. The charge was filed on March 3, 1992, which was well within the six month period. I also agree with the General Counsel that the case is not barred by the principle of issue preclusion. The complaint presents new issues not previously considered.

I agree with Respondent INS that it did not commit an unfair labor practice by the conduct described, that is, "[b]y letter dated January 27, 1992, Respondent INS refused to implement the parties' collective bargaining agreement stating that the D.C. Circuit Court of Appeals dismissal of the Respondents' appeal as described in paragraph 10 did not require that Respondent INS implement the INS-Union collective bargaining agreement."

It is clear from the May 9, 1991 Order of the United States Court of Appeals for the District of Columbia Circuit in United States Department of Justice, Immigration and Naturalization Service v. Federal Labor Relations Authority (No. 90-1613) that INS was not required to engage in any affirmative act by INS, 37 FLRA 1346. The Solicitor of the Authority made clear to the Court that "[t]he Authority neither addressed the validity of the 1987 agency head dis-approval nor directed the parties to implement any specific contract provisions." As the Authority stated, "The manner of implementation, as well as the effective date of the agreement, is within the purview of the parties." 38 FLRA at 1369.

Since the validity of the 1987 agency head disapproval, or at least portions of it, was still in issue (though not in issue in INS) and remained effective as a bar to implementation of the Jaffe agreement, the Union's action in merely withdrawing Article 32.B. did not require the immediate implementation of the Jaffe agreement once the Respondent's appeal of the Authority decision was dismissed, as demanded by the Union in its January 2, 1992 letter.

I also agree with Respondent that the Union's January 2, 1992 demand was for Respondent to implement all of the Jaffe award minus only Article 32.B. That is also how the conduct is described in paragraph 11 of the complaint. The Union's January 2, 1992 letter setting forth the demand did not state that the Union was withdrawing, or had withdrawn, other provisions, nor did it reiterate or refer to its March 21, 1991 letter in which it requested,

> that the parties implement an agreement consisting of: the Jaffe award, modified pursuant to 31 FLRA No. 94 and 37 FLRA No. 111 (i.e., without Section 32.B), and without the provisions which were the subject of O-NG-1480 but were not also addressed in 31 FLRA No. 94 (i.e., those shown in the attached Appendix).

I also agree with Respondent that, even if the January 2, 1992 demand could be construed as implicitly repeating the March 21, 1991 request, the March 21, 1991 request was not an unequivocal withdrawal of the seven provisions which the agency head had disapproved but which the Authority had never ruled upon. The Union emphasized in the very next sentence that

> This request does not waive any AFGE rights to pursue implementation of Section 32.B. and the provisions identified in the Appendix. AFGE intends to pursue implementation of those provisions through other appropriate procedures at the earliest possible moment.

In view of this disposition, it is not necessary to consider the additional defenses raised by Respondent INS.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, September 27, 1994

GARVIN LEE OLIVER

Administrative Law Judge

1. The complaint also alleged that Respondent Department of Justice (DOJ) "steadfastly maintains that the provisions found to be non-negotiable by the Authority in U.S. Department of Justice and Immigration and Naturalization Service, 37 FLRA 1346 (1990), should now be renegotiated and absent such nego-tiations taking place has instructed Respondent INS not to implement the INS-Union collective bargaining agreement." The complaint alleged that by such conduct DOJ interfered with the collective bargaining relationship between Respondent INS and the Union and thereby violated section 7116(a)(1) and (5) of the Statute. These allegations were dismissed at the hearing on motion of the Respondent DOJ, there being a failure of the evidence to properly support such allegations. (Tr. 81-97). The General Counsel requests reversal of this ruling and refers to the action of Respondent DOJ's attorney in filing memoranda and requests with the Authority, an appeal to the Court of Appeals, and giving legal advice to Respondent INS. I adhere to the ruling dismissing the allegations, there being a failure of the evidence to properly support such allega-tions. Paragraph 14 of the complaint also alleged, in part, that Respondent INS had violated the Statute "by the conduct described in paragraph . . . 13" (the conduct of Respondent DOJ). This allegation was not mentioned or explained further at the hearing or in the brief and the reference to para-graph 13 appears to have been a clerical error.

2. Prior to the hearing, Judge William Naimark denied Respondents' motion for summary judgment, holding that the statute of limitations did not bar the complaint. Judge Naimark also denied Respondents' motion to dismiss the complaint for failure to state a cause of action as well as the General Counsel's cross-motion for summary judgment. (G.C. Exhs. 1(e), 1(f)).