

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

UNITED STATES DEPARTMENT OF
TRANSPORTATION,
FEDERAL TRANSIT ADMINISTRATION
WASHINGTON, D.C.

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3313

Case No. 19 FSIP 043

DECISION AND ORDER

This case, filed by the U.S. Department of Transportation, Federal Transit Administration, Washington, D.C. (Agency or Management) on May 15, 2019, concerns a dispute between it and the American Federation of Government Employees, Local 3313 (Union) over one remaining article in the parties' successor collective-bargaining agreement (CBA). The Agency filed its dispute with the Federal Service Impasses Panel (FSIP or the Panel) pursuant to Section 7119 of the Federal Service Labor-Management Relations Statute (Statute). On August 8, 2019, the Panel asserted jurisdiction over this dispute and directed it to be resolved in the manner that is discussed below.

BARGAINING AND PROCEDURAL HISTORY

The Agency is a component of the Department of Transportation (DOT) and provides financial and technical assistance to local public transit systems, including buses, subways, light rail, commuter rail, trolleys and ferries. The Agency also oversees safety measures and helps develop next-generation technology research. The Union represents approximately 230 General-Schedule and Wage-Grade employees at the Agency's Headquarters in Washington, D.C. The parties are represented by a CBA that expired in July 1987, but continues to roll over on an annual basis until it is replaced by a new contract.

The parties met around a dozen times between August 2018 and April 2019 to bargain a new CBA. They also received 3 days of mediation assistance from the Federal Mediation and Conciliation Services (FMCS) in April 2019. The Mediator released the parties from mediation on April 25, 2019, in FMCS Case No. 201912070024.

The Agency filed its request for assistance with the Panel and initially stated that 20 articles were in dispute. The Union agreed not to pursue 18 of those articles, however. On August 8, 2019, the Panel voted to assert jurisdiction over the 2 remaining articles and to resolve them through a Written Submissions procedure, with an opportunity for rebuttal statements. The parties timely submitted their positions in accordance with Panel instructions on August 21, 2019. On August 30, 2019, the Agency submitted a rebuttal statement. Despite being afforded an opportunity to submit its own rebuttal statement, the Union did not do so.

On August 30, 2019, the parties informed the Panel that they had reached an agreement on one of the two remaining articles involving arbitration costs. They further provided the Panel a copy of the agreement on this article. Accordingly, the parties' dispute over this article has been resolved.

PROCEDURAL ISSUES

In its August 21st submission to the Panel, the Union argues that the Panel lacks jurisdiction over this dispute. In this regard, the Union offers the following:

[T]he Union believes that the Panel does not have authority to render a decision in this manner because it is not properly composed. Specifically, the Panel does not have the requisite number of members required by Section 7119 to issue a decision, and the Panel's current members were appointed in violation of the Appointments Clause to the United States Constitution.

The above constitutes the full extent of the Union's argument concerning the Panel's jurisdiction. In its rebuttal, the Agency disagreed with both positions and requests that the Panel move forward with a decision on the merits. The Union's claims are addressed as follows.

I. Lack of Quorum

The Union argues that the Panel lacks jurisdiction because it did not have an appropriate number of Panel Members under the Statute when it asserted jurisdiction over this dispute. The Panel will reject this argument.

The Union's claim appears to be based upon the idea that the Panel lacks the statutory authority to take any action in the absence of a full quorum. In this regard, as noted above, the Panel asserted jurisdiction over this dispute on August 8, 2019. On this date, the Panel consisted of a Chairman and five other Panel Members. That is, the Panel had six total Members. Thus, the Union appears to be taking the position that the Panel lacked the statutory authority to take the foregoing action because, on the 8th, the Panel lacked seven Members.

Section 7119 of the Federal Service Labor-Management Relations Statute (the Statute) establishes the Federal Service Impasses Panel. 5 U.S.C. §7119(c)(2) states that the "Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President." (emphasis added). No part of §7119 (or any other portion of the Statute) discusses what actions the Panel may take when confronted with a vacancy. The Statute, however, also permits the issuance of regulations to "carry out the provisions of [the Statute]."¹ Promulgated regulations that govern the Panel define a quorum, for purposes of Section 7119, as "a majority of the members of the Panel." (emphasis added).²

The foregoing framework demonstrates that Congress unambiguously determined that the Panel "shall" consist of a Chairman and "at least" six other Panel Members. But, Congress remained silent on the number of Members that are necessary to form a quorum or otherwise allow the Panel to act. The regulatory definition of what constitutes a quorum filled that silence by providing that a quorum is a simple majority. On August 8th, the Panel consisted of six-Presidentially appointed Members. A majority of those Members voted to assert jurisdiction over this dispute. The Panel's action was entirely consistent with the statutory framework established by Congress. The Union's jurisdictional challenge, therefore, is rejected.

II. Appointments Clause

¹ 5 U.S.C. §7134.

² 5 C.F.R. §2470.2(h).

The Union's position is based upon an argument that the Panel's composition violates the Appointments Clause of the United States Constitution.³ In this regard, the Union contends that the Panel is not "properly composed." But, the Union provides little in the way of further argument or analysis.

As a general rule, a Federal administrative agency is without authority to pass on the constitutionality of a Federal statute that created that agency.⁴ But, that rule is not a mandatory one. That is, agencies have some degree of autonomy to decide whether they wish to enforce that rule.⁵ The FLRA, however, has indicated that it may not assess whether the Federal Service Labor-Management Relations Statute is constitutional.⁶ This position is based upon Federal court precedent concerning the FLRA which has arrived at the same conclusion.⁷

³ The Appointments Clause provides that the President of the United States:

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II, § 2, cl. 2.

⁴ See, e.g., *Johnson v. Robinson*, 415 U.S. 361, 368 (1974) ("(a)djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies" (citations omitted)).

⁵ See, e.g., *Thunder Basin Coal v. Reich*, 510 U.S. 200, 215 (1994); *Elgin v. U.S. Dep't of Treasury*, 641 F.3d 6, 12 & n.5 (1st Cir. 2011), *aff'd sub nom. Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012).

⁶ See, e.g., *NFFE and Jonathan Jarman*, 68 FLRA 68 FLRA 374, 377-78 (2015).

⁷ See, e.g., *NTEU v. FLRA*, 986 F.2d 537, 540 (D.C. Cir. 1993).

Notwithstanding the foregoing framework, the United States Court of Appeals for the District of Columbia has explained that the FLRA may consider constitutional *implications* when interpreting the Statute.⁸ Consistent with this line of authority, the FLRA routinely resolves both constitutional questions and questions regarding the Panel's jurisdiction in unfair labor practice proceedings and in the review of grievance arbitration awards.⁹ Although a Panel proceeding is obviously not a grievance or ULP proceeding, this FLRA precedent establishes that the Panel may have some authority to address issues that touch upon the intersection between §7119 of the Statute and the U.S. Constitution.

The framework described above provides a potential framework to resolving the Union's constitutional claim, but it is an uncertain one. The paucity of the Union's argument does not lend itself to assessing whether the Union is challenging the constitutionality of 5 U.S.C. §7119, raising issues of constitutional interpretation concerning §7119, or arguing something else altogether. Consequently, the Panel cannot, with confidence, apply an established legal framework to resolve the Union's constitutional assertion. Accordingly, the Panel shall decline to consider the Union's argument.

SUBSTANTIVE ISSUE

I. Negotiated Grievance Procedure

A. Agency Position

⁸ See *id.*

⁹ See Veterans Admin. Washington, D.C., 26 FLRA at 268-69 (reviewing Panel decision to determine whether the Panel "exceed[ed] its authority in asserting jurisdiction" and whether its order was "contrary to law"); U.S. Dep't of Def. Educ. Activity, Arlington, Va., 56 FLRA 119, 120, 122 (2000) (sustaining agency's objection "that enforcing the Panel's Order would violate the Appropriations Clause, the doctrine of separation of powers and the doctrine of sovereign immunity contained in the United States Constitution."); U.S. Dep't of Health & Human Servs. Gallup Indian Med. Ctr. Navajo Area Indian Health Serv., 60 FLRA 202, 213 n. 7 (2004) ("Gallup Indian Med. Ctr.") ("[T]he [FLRA] consistently has resolved exceptions to arbitration awards involving constitutional claims. . . . We note, in this connection, that no precedent indicates that we are precluded from resolving constitutional issues.").

Management proposes excluding two topics from the scope of the parties' negotiated grievance procedure: (1) removals; and (2) performance ratings. As to the former topic, Management argues that flawed removal-arbitration decisions can negatively impact the workforce, especially given the relatively small size of the Agency's workforce. There was a recent arbitration decision in which the arbitrator ordered the Agency to rescind a proposed removal of an employee who had allegedly made a threatening statement to a supervisor during a performance review. The arbitrator instead imposed a 1-year suspension, which will ultimately require, among other things, that the Agency reinstate the employee. According to the Agency, a similar situation arose in an arbitration decision in the case of *SSA v. AFGE, Local 3571*,¹⁰ where a separate arbitrator reduced an employee's removal without "any legal justification." These arbitration decisions, again, according to the Agency, demonstrate the dangers of allowing untrained arbitrators to address these sorts of matters, particularly since they "often attempt to split their decisions as a course of business."

The foregoing arbitration decisions stand in stark contrast to how these types of disputes are ordinarily handled by other reviewing tribunals. Other tribunals have reviewed "similar" cases involving other agencies and have either ruled against the grievant or adjusted an arbitrator's award due to flaws. Those decisions include:

- In *Jolly v. Dep't of the Army*,¹¹ the Merits System Protection Board (MSPB) upheld an agency's determination to remove an employee due to threatening remarks;
- In *Greenstreet v. SSA*,¹² the United States Court of Appeals for the Federal Circuit upheld an arbitrator's decision to mitigate a suspension to a removal but remanded the award for a better supported decision concerning the length of the suspension; and

¹⁰ The Agency did not provide a copy of the decision, but only a citation of "CL2018-R-0003" without explanation on how to access it.

¹¹ 2016 WL 1534085.

¹² 543 F.3d 705 (Fed. Cir. 2008).

- Finally, the Agency cites a non-precedential decision from the United States Court of Appeals for the Federal Circuit of *Borza v. Dep't of Commerce*, where the court remanded a dispute back to an arbitrator for a more detailed analysis of the appropriate penalty.¹³

According to the Agency, several of these decisions show that arbitrators simply prefer to "split the baby" and mitigate a removal to a suspension in order to placate both sides. But, as can be seen above, suspensions are often poorly explained and require further litigation to adjudicate. Worse still, agencies have few options for appeal, as the Director for the Office of Personnel Management (OPM) must exercise their discretion and decide to appeal erroneous decisions stemming from MSPB-related matters such as removals.¹⁴ OPM rarely decides to appeal such decisions when they arise within the context of arbitration, however. The foregoing demonstrates an inherently flawed process that should not be permitted to continue under the parties' negotiated grievance procedure.

Turning to the topic of excluding performance ratings, Management argues this topic should be excluded because parties and personnel spend "hours" presenting and preparing cases "without much to be reviewed or decided." In this regard, Management alleges that grievances on this topic often "challenge the judgment" of a rating official and, therefore, "are often not based on objective documentation." The Agency also argues employees do have other options for review available, including the use of a Performance-Improvement-Plan (PIP), internal Agency mediation, and the availability of pursuing Equal Employment Opportunity (EEO) claims.

Finally, for both proposed exclusions, Management notes that it relied "in part" upon Executive Order 13,839, "*Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles*" (Removal Order) during these negotiations.¹⁵ Section 3 of this Order calls for agencies to exclude the aforementioned items from a negotiated grievance procedure. However, it admits that its reliance upon the Order was not its "sole reason" for its proposal.¹⁶

¹³ *Borza v. Dep't of Commerce*, No. 2018-1873 (Fed. Cir. 2019) (non-precedential).

¹⁴ See 5 U.S.C. §7703(d).

¹⁵ See Agency Initial Statement of Position at 1 (quoting Removal Order, Section 3).

¹⁶ *Id.* at 2.

B. Union Position

The Union opposes both of Management's proposed exclusions. It cites the recently issued Panel decision in *Social Security Administration and AFGE*, 19 FSIP 019 (May 2019) (*SSA*), to bolster its opposition. In *SSA*, the Panel recognized federal court precedent that holds a proponent of grievance exclusion bears the burden of justifying that exclusion. The Union argues that Management's arguments do not satisfy this burden.

As a general matter, record data kept by the Union establish that only 17 Union-filed grievances have arisen between 2012-2018. None of these grievances involved a removal, and only five dealt with employee "performance." As to these performance matters, however, it is not clear whether they concerned the specific topic of performance ratings. The existing grievance procedure, therefore, has not imposed an egregious burden upon the Agency. It is the Union's argument that removal and rating matters are often resolved before advancing to the grievance stage. Indeed, all of the aforementioned 17 grievances were resolved, through settlement or withdrawal, before the invocation of arbitration.

Addressing the Agency's specific argument concerning the arbitration decision involving an Agency employee, the Union disagrees that the decision supports Management's proposed exclusion. Management's citation of the decision amounts to nothing more than "disagreeing with the outcome" of the arbitration award. Moreover, the Agency did not explain what, if any, forums would be available to employees should the grievance procedure exclude removals and performance-rating challenges.

Finally, as to the Agency's reliance upon the Removal Order, in its August 21st submission to the Panel, the Union noted a Federal judge issued an injunction on the Agency's relied upon section of the Order. Although the United States Court of Appeals for the District of Columbia reversed that decision, it ordered the injunction to remain in place pending completion of further litigation. Thus, the Union took the position that accepting the grievance exclusions would be "contrary to current law,"¹⁷ and that the Agency's proposals "based on the Executive Orders must be rejected."¹⁸

¹⁷ Union Initial Statement of Position at 2.

¹⁸ *Id.* at 3.

C. Conclusion

President Trump issued three Executive Orders on May 25, 2018, that address primarily the topic of public-sector collective bargaining. One of those Orders was the Removal Order. Section 3 of the Order directs agencies to exclude, from a negotiated grievance procedure, grievances that involve decisions to remove employees from Federal service, i.e., terminations, and challenges to an employee's annual performance rating of record. The United States District Court for the District of Columbia enjoined parts of the three Executive Orders in a decision dated August 24, 2018, including the two foregoing provisions in the Removal Order.¹⁹ The United States Court of Appeals for the District of Columbia reversed that decision on July 16, 2019.²⁰ But, in a simultaneously issued order, the Court of Appeals ordered the injunction to remain in place pending the filing and resolution of any petition for a full en banc hearing. The Plaintiffs filed a petition and, on September 25, 2019, the D.C. Circuit denied the Plaintiff's petition and informed the parties that its July 16, 2019, decision would go into effect on October 3, 2019, absent a stay. No stay issued. As such, as of October 3rd, the Executive Orders are in effect.

It is against the above background that the Union's arguments must be weighed. The Union is correct to note that, under existing Federal precedent, a proponent of a grievance exclusion must "establish convincingly . . . in a particular setting" that a proposed grievance exclusion is warranted.²¹ And, in the SSA Decision and Order, the Panel recognized its obligation to adhere to this precedent. The Panel, nevertheless, believes that this "particular setting" demonstrates the appropriateness of accepting Management's position.

The Agency has been clear throughout this dispute that it partially relied upon the Removal Order throughout these negotiations. The Union was obviously aware of this as it addressed that point in its August 23rd submission to the Panel. But, its arguments focused on the then-valid injunction of the Order. Indeed, the Union was quite clear in its position that the Agency's argument violated "current law."²² But, as the Union

¹⁹ *AFGE and NTEU v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018).

²⁰ *AFGE, AFL-CIO v. Trump*, 929 F.3d 748 (D.C. Cir. 2019).

²¹ *See AFGE v. FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983).

²² Union Statement of Position at 2.

essentially acknowledged in its arguments, that injunction was in peril if the D.C. Circuit Court of Appeals declined to accept the Plaintiff's request for reconsideration. Despite this danger, the Union provided no other arguments concerning the validity of the Order or otherwise challenged it or its requirements. The lack of challenge is heightened by the Union's failure to submit a rebuttal statement on August 30, 2019, despite having the right to do so. The Union's lack of arguments is noteworthy in light of the fact that the U.S. Office of Personnel Management (OPM) recently issued guidance on October 4, 2019, directing agencies to comply with the Executive Orders.²³

In the "particular setting" of this dispute, the Panel is faced with a binding Executive Order that the President and OPM has directed agencies to follow. As the Panel has discussed in other matters, the relevant Orders provide a source of important public policy to parties involved in the course of negotiations that arise under the Statute.²⁴ Although nothing within this Order purports to bind the Panel, and nor could they,²⁵ it is appropriate to give weight to the principles espoused under the Orders.

The Agency made the Removal Order a part of its position throughout this dispute. The Union's only rebuttal to the applicability of this Order was an argument that the Union reasonably knew could expire during the pendency of this dispute. Given the lack of Union response, in conjunction with the weight that should be attributed to the Removal Order, the Panel believes it is appropriate to accept Management's proposals as a resolution to this dispute. Moreover, in this circumstance, the Panel concludes that the Agency has convincingly demonstrated the propriety of the exclusion per their un rebutted arguments described *infra*. In argument, the Agency represented that arbitrators treatment of grievances

²³ See "Updated Guidance on Implementation of Executive Orders 13836, 13837, and 13839" (October 4, 2019) (available at <https://chcoc.gov/content/updated-guidance-implementation-executive-orders-13836-13837-and-13839>).

²⁴ See, e.g., *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base and NAIL, Local 7*, 2019 FSIP 028 (2019).

²⁵ See, e.g., *U.S. Dep't of Transp., Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779, 787 (D.C. Cir. 2013) (quoting *NTEU and U.S. DHS, CBP, Wash., D.C.*, 63 FLRA 183, 187 (2009)) (acknowledging the Panel's status as an "independent entity").

related to performance ratings and review were both arbitrary and required significant resources to resolve. The Union offered no substantive rebuttal to the Agency's argument. As such, the Agency's argument is plainly more compelling. Even if, in these circumstances where the Agency's argument is unrebutted on substance, the Executive Orders were not in effect, the Panel would conclude the Agency had carried its burden to justify the exclusion of the subject grievances from the grievance arbitration process. Accordingly, the Panel will order the adoption of the Agency's two proposals.

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated above.



Mark A. Carter
FSIP Chairman

November 14, 2019
Washington, D.C.