FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-05

DEPARTMENT OF THE INTERIOR

RESPONDENT

AND

NATIONAL TREASURY EMPLOYEES UNION

CHARGING PARTY

Case No. WA-CA-12-0268

Douglas J. Guerrin
For the General Counsel

Jodi B. Vargas
For the Respondent

Luke Chesek
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On July 9, 2012, the Regional Director of the Washington Region of the Federal Labor Relations Authority (Authority) issued an Amended Complaint and Notice of Hearing alleging that the National Park Service violated § 7116(a)(1) and (6) of the Federal Service Labor-Management Relations Statute (Statute). The Complaint alleged that the National Park Service, a bureau within the Respondent Department of the Interior, refused to comply with a Federal Service Impasses Panel (Panel) Decision and Order in accordance with § 7119(c)(5)(C).

On August 13, 2012, the General Counsel (GC) filed a Motion for Summary Judgment (MSJ) and the hearing was indefinitely postponed. The MSJ was denied on February 8, 2013, because a genuine issue of material fact existed regarding whether it was

the National Park Service or the Respondent that disapproved of the Panel's Order. On February 13, 2013, the Regional Director withdrew the Complaint against the National Park Service. On May 7, 2013, an Amended Complaint was issued alleging that it was the Department of the Interior that violated the Statute by failing to comply with the Panel's Order.

On May 30, 2013, the Respondent filed an Answer admitting all of the material facts but denying it violated the Statute. On June 18, 2013, the GC filed a MSJ alleging that a summary judgment was proper pursuant to 5 C.F.R. § 2423.27(a). The Respondent timely submitted a motion in opposition, arguing that summary judgment was improper because the facts admitted in the Answer did not constitute a violation of the Statute.

STANDARD FOR SUMMARY JUDGMENT

Motions for summary judgment filed under § 2423.27 of the Authority's Rules and Regulations are governed by the same principles as motions filed under Rule 56 of the Federal Rules of Civil Procedure. *E.g. Dep't of the Navy, U.S. Naval Ordinance Station, Louisville, Ky.*, 33 FLRA 3, 4-6 (1988). Rule 56(c) provides that a MSJ should be granted if the pleadings and evidence submitted demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

After reviewing the GC's motion, the Respondent's opposing motion, and the evidence submitted therewith, I have determined that summary judgment is appropriate because no genuine issue of material fact exists. I find that the Respondent violated § 7116(a)(1) and (6) of the Statute by failing to comply with the Panel's Decision and Order in *Dep't of the Interior, NPS, Wash. Admin. Serv. Org., Wash., D.C.*, Case No. 10 FSIP 119 (2011) (*NPS*), which ordered the Respondent to adopt the language of Article 1, Section 6 into its collective bargaining agreement with the National Treasury Employees Union (Union). The Respondent is ordered to cease and desist from failing to comply with the Panel's Decision and Order, specifically regarding Article 1, section 6 (now designated as Article 1, section 5), and to post a notice of the violation.

FINDINGS OF FACT

1. The unfair labor practice Complaint and Notice of Hearing was issued under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV.

2. The Respondent is an agency within the meaning of 5 U.S.C. § 7103(a)(3).

3. The Union is a labor organization under 5 U.S.C. § 7103(a)(4) and is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the National Park Service.

4. The National Park Service is a bureau within the Respondent.

5. The charge was filed by the Union with the Washington Regional Director on February 8, 2012.

6. A copy of the charge was served on the Respondent.

7. At all material times, the following individual held the position opposite his name at the Respondent:

Thomas A. Mulhern	Director, Office of Human Resources, Department of the Interior

8. At all material times, the individual named in paragraph 7 was a supervisor and/or management official within the meaning of 5 U.S.C. § 7103(a)(10) and (11) at the Respondent.

9. At all material times, the individual named in paragraph 7 acted on behalf of the Respondent.

10. In October 2010, the Federal Service Impasses Panel (Panel) asserted jurisdiction over term contract negotiations between the National Park Service and the Union.

11. The Panel directed the parties to resume bargaining with a private Factfinder over 37 of 60 unresolved contract provisions.

12. The Panel informed the parties that if any issues remained unresolved at the conclusion of facilitated bargaining, the Factfinder would issue recommendations for settling the issues, and that any party objecting to the Factfinder's recommendations would notify the Panel and the other party, in writing, and the Panel would take whatever action it deemed appropriate should issues remain unresolved.

13. On July 14, 2011, the Factfinder recommended that the parties adopt Article 1, Section 6.

14. The Panel issued an Order to Show Cause, directing the parties to demonstrate why the Factfinder's recommendation should or should not be imposed.

15. On September 27, 2011, the National Park Service responded to the Order to Show Cause and requested the Panel to strike the Factfinder's recommendation of adopting Article 1, Section 6, because it was inconsistent with *Fed. BOP v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011) (*Prisons*).

16. The Panel issued a Decision and Order in *NPS*, Case No. 10 FSIP 119, that adopted the Factfinders recommendation concerning Article 1, Section 6 and directed the Respondent to incorporate it into its collective bargaining agreement (CBA) with the Union.

17. Pursuant to negotiations conducted subsequent to the Panel's Decision and Order, Article 1, Section 6 was designated as Article 1, Section 5 by the parties; but it remained textually identical to its prior enumeration.

18. Article 1, Section 5 states:

> The parties agree that the only covered-by defense that may be asserted by either party under this Agreement is one based on the 'express language' of the Agreement. The 'inseparably bound up with' defense will not be available to either party. Additionally, neither party may in any way rely upon bargaining history of the express language to argue that there is a covered by defense. The 'express language' defense may only be raised while this Agreement is in effect.

19. Pursuant to § 7114(c)(1) of the Statute, the Respondent conducted Agency Head Review of the Panel's Decision and Order.

20. The Union and the National Park Service thereafter reached agreement on all disputed provisions except Article 1, Section 5.

21. On December 28, 2011 and January 24, 2012, the Respondent disapproved of the Panel's Decision and Order regarding Article 1, Section 5 and notified the Union that it would not incorporate the provision into the agreement.

DISCUSSION

In its motion for summary judgment the GC asserts that the Respondent violated § 7116(a)(1) and (6) of the Statute by refusing to comply with the Panel's Decision and Order directing it to adopt Article 1, Section 5. The Respondent claims that the Complaint fails to state a claim on which relief can be granted. It also contends that it did not violate the Statute because the parties agreed not to bind themselves to the Panel's Decision and Order; that Article 1, Section 5 contradicts other provisions in the CBA; the Panel's Decision and Order was prejudicial; and the language of Article 1, Section 5 is contrary to collective bargaining principles.

It is undisputed that the Panel issued a Decision and Order in *NPS*, Case No. 10 FSIP 119, directing the Respondent to incorporate into its CBA what is currently titled Article 1, Section 5. The Respondent concedes that it disapproved the Panel's Order and notified the Union that it would not incorporate Article 1, Section 5 into the agreement.

With respect to the procedural issue raised by the Respondent, I reject the contention that the Complaint fails to state a claim on which relief can be granted. It is well established that "an agency's refusal to implement a Decision and Order of the [Panel] requiring the parties to adopt language in their collective bargaining agreement violates section 7116(a)(1) and (6) of the Statute unless the Authority finds that the failure to comply with the Panel's Order was justified because the provisions are contrary to the Statute or other applicable law, rule or regulation." *E.g. U.S. Dep't of the Treasury, IRS*, 23 FLRA 774, 777-78 (1986) (*Treasury*). An agency head's disapproval of a Panel imposed provision does not violate the Statute per se; however, disapproval is subject to review in an unfair labor practice proceeding. *Id.* at 778. If the Authority determines that the disapproved provision is not "contrary to the Statute or other applicable law, rule or regulation[,]" the disapproving agency violates § 7116(a)(1) and (6) of the Statute. *Id.*

Here, the Complaint incorrectly alleges that Article 1, Section 5 "is not subject to Agency Head Review" because it "is not contrary to the Statute or other applicable laws, rules or regulations[.]" While inaccurate, the imprecise language is not fatal to the compliant. *Dep't of Transp., FAA, Fort Worth, Tex.*, 55 FLRA 951, 956 (1999) ("The sufficiency of a complaint is not judged on the basis of rigid pleading requirements."). In fact, the Respondent addressed the allegations against it in its opposing motion and there is no evidence that the imprecise Complaint caused confusion. *See U.S. DOJ, Office of Justice Programs*, 50 FLRA 472, 477 (1995) (finding that the Respondent understood the allegations against it because the Respondent addressed those allegations in its submission to the Authority). Accordingly, the complaint presents a cognizable claim.

The Respondent initially argued that Article 1, Section 5 was inconsistent with *Prisons*. In *Prisons*, the Court of Appeals for the D.C. Circuit rejected an Authority decision finding that an agency committed an unfair labor practice by refusing to bargain over a subject the agency asserted was covered by the contract. *Id.* at 97-98. In that case, the court determined that the Authority misapplied the "covered by" doctrine which permits a party to refuse to bargain over a matter where the matter: (1) is expressly contained in a negotiated agreement; or (2) is inseparably bound up with a subject covered by the agreement. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000).

The Respondent's reliance on *Prisons* to disapprove Article 1, Section 5, which precludes the parties from using the second prong of the "covered by" doctrine, is misguided. The court in *Prisons* did not hold that a provision limiting the "covered by" doctrine was contrary to the Statute or other rule or regulation. The parties in the *Prisons* case had not negotiated a limit upon the "covered by" doctrine. The court merely restated the doctrine and applied it to a particular set of facts, thus, the case does not stand for the proposition that parties to a negotiated agreement are precluded from reducing the scope of the doctrine through collective bargaining. More importantly, the Authority has held that permitting parties to negotiate a limitation of the "covered by" defense promotes collective bargaining

principles. *NTEU*, 64 FLRA 156, 158 (2009) (*NTEU*) (a duty to bargain over "whether and how" the "covered by" defense will apply is consistent with the Statute's policies of: "(1) promoting collective bargaining and the negotiation of collective bargaining agreements; and (2) enabling parties to rely on the agreements that they reach, once they have reached them.").

Recognizing the error of relying upon the holding of *Prisons* as justification for its refusal to comply with the Decision and Order of the Panel, the Respondent now attributes that argument to the National Park Service. However, the copies of the relevant disapprovals submitted with the motions identify the Respondent as the disapproving Authority. In fact, the Respondent admits that it disapproved of the Panel's Decision and Order on multiple occasions. There is no evidence to suggest that the National Park Service, as a Bureau of the Respondent, independently disapproved of the Order. *See Dep't of the Treasury & IRS*, 22 FLRA 821, 825 (1986) (finding that the Statute was not violated by a subordinate organization engaging in ministerial action, but was violated by the superior organization's actual disapproval).

The Respondent next contends that it did not violate the Statute because the parties subsequently agreed to revise certain provisions ordered by the Panel. The Statute mandates that any final action of the Panel "shall be binding on [the] parties . . . unless the parties agree otherwise." 5 U.S.C. § 7119(c)(5)(C). In essence, the Respondent contends that "unless the parties agree otherwise" means the entirety of a Panel's Decision and Order can be ignored if the parties subsequently renegotiate and reach agreement upon any single provision imposed by the Order. However, this interpretation of that statutory provision is not supported with precedent or legislative history. If parties were not obligated to adopt a Panel's Order simply by agreeing to revise one or more of the ordered provisions, the parties would remain at impasse on any provision that remained in dispute with no incentive to reach an agreement or other means of resolution. It was Congress' intent to grant the Panel with the power to require parties to adopt contract language in order to avoid the type of conflict that accompanies impasse in the private sector. *NTEU, Chapter 83*, 35 FLRA 398, 415-16 (1990). Interpreting the statutory language in the manner requested by the Respondent would frustrate collective bargaining and the purpose and power of the Panel by rendering the entirety of the Decision and Order null and void just because a subsequent agreement was reached upon a single provision subject to the Order.

The Respondent also asserts that Article 1, Section 5 materially contradicts another article in the parties' agreement. At the outset, I note that being contrary to another provision within the agreement is not the same as being "contrary to the Statute or other applicable law, rule or regulation." *U.S. Dep't of Def. Educ. Activity, Arlington, Va.*, 56 FLRA 119, 121 (2000) (an agency's refusal to implement an Order of the Panel violates the Statute "*unless* [the Authority finds that] it is *contrary to the Statute or any other applicable law, rule or regulation.*") (emphasis added). Moreover, it is well established that the proper forum to resolve disputes over the meaning of provisions contained in a collective bargaining agreement is that which the parties adopted for such a purpose, i.e. the grievance procedure.

AFGE, AFL-CIO, Local 4, 4 FLRA 458, 458-59 (1980). Therefore, the Respondent's disapproval of Article 1, Section 5 based upon a manufactured contradiction achieved via tortured interpretation, does not justify the failure to implement the Panel's Decision and Order.

The Respondent's two final arguments are that the Panel's Decision and Order was prejudicial, and that Article 1, Section 5 is contrary to collective bargaining principles. First, I fail to see how the Panel's Decision and Order was a result of legal prejudice. The Panel required both parties to show cause as to why the Factfinder's recommendations should not be mandated; the Respondent acknowledged that the Panel informed both parties that it would take whatever action it deemed appropriate if facilitated bargaining failed; and the Respondent was granted 30 days from the date of the Panel's Decision and Order to conduct Agency Head Review. The Panel's conduct was clearly within its authority under § 7119 and the Panel demonstrated no prejudice to either party. Determining who wins and who loses when parties are at impasse is the Panel's purpose and coming up on the losing side of that decision is not evidence that the determination was made with prejudice. As no evidence of prejudice is present, the argument must fail.

As to the second of these dubious arguments, the Authority has held that permitting parties to negotiate a limitation upon the "covered by" defense is consistent with the purposes of the Statute, thus, such a provision would not be contrary to bargaining principles. *NTEU*, 64 FLRA at 158. If anything, it is the Respondent's argument that subsequent renegotiation and agreement upon any provision imposed by the Panel negates all other provisions ordered by the Panel that is contrary to collective bargaining principles. Such a process would suspend the remaining provisions in a negotiating never land with no means of final resolution via an unfair labor practice charge. Since neither of these arguments establish that Article 1, Section 5 is "contrary to the Statute or other applicable law, rule or regulation", they provide no defense to the Respondent's failure to comply with the Panel's Decision and Order. *Treasury*, 23 FLRA at 777-78.

Finally, although the Respondent did not directly allege that Article 1, Section 5 was nonnegotiable, "an agency head's disapproval of a provision in a negotiated agreement is an allegation of nonnegotiability . . . ." *Interpretation & Guidance*, 15 FLRA 564, 567 (1984). However, the negotiability of a proposal limiting the "covered by" defense was decided in *NTEU*. There, the Union proposed two provisions that prevented the Agency from using the "inseparably bound" prong of the "covered by" defense. 64 FLRA at 156. The Authority held that bargaining over a proposal to limit the scope of the "covered by" defense was a mandatory subject of bargaining, consistent with the Statute's policies of promoting negotiation and facilitating reliance on bargained agreements. *Id.* at 158. Similar to the provisions in *NTEU*, Article 1, Section 5 limits the use of the "inseparably bound" prong of the "covered by" defense. Because Article 1, Section 5 is substantively identical to the proposals found negotiable in *NTEU*, the Respondent's disapproval of the Panel's lawful Decision and Order represents a "refus[al] to cooperate in impasse procedures and impasse decisions" under § 7116(a)(6).

I find that the Respondent failed and refused to comply with the Federal Service Impasses Panel Decision and Order in violation of § 7116(a)(6) and this conduct interfered with, restrained, or coerced employees in the exercise of their rights in violation of § 7116(a)(1).

CONCLUSION

The record demonstrates that the Respondent failed and refused to comply with the Decision and Order of the Panel, in violation of § 7116(a)(1) and (6). Accordingly, I recommend that the Authority grant the General Counsel's Motion for Summary Judgment and adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the U.S. Department of the Interior, shall:

1. Cease and desist from:

(a) Failing and refusing to fully comply with the Federal Service Impasses Panel Decision and Order issued on November 30, 2011, in Case No. 10 FSIP 119, by failing and refusing to approve of what was then Article 1, Section 6 and is now designated as Article 1, Section 5.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Withdraw and rescind its disapproval of what is now designated as Article 1, Section 5, which was to be included in the negotiated agreement of the Department of the Interior, National Park Service and National Treasury Employees Union, as directed by the Decision and Order of the Federal Service Impasses Panel issued on November 30, 2011, in Case No. 10 FSIP 119, and notify the parties of such in writing.

(b) Post at all National Park Service facilities where bargaining unit employees represented by the union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Secretary, Department of the Interior or his designee, and posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Disseminate a copy of this Notice signed by the Secretary of the Department of the Interior or his designee, through the National Park Service e-mail system, to all bargaining unit employees.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Washington Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 4, 2014

CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Interior violated the Federal Service Labor-Management Relations Statute (Statute), and it has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to comply with the Decision and Order of the Federal Service Impasses Panel (Panel) issued on November 30, 2011, in Case No. 10 FSIP 119, by failing and refusing to approve the provision directed by the Panel, specifically what was then Article 1, Section 6 and is now designated as Article 1, Section 5, which is not contrary to the Statute or other applicable law, rule, or regulation.

WE WILL withdraw and rescind our disapproval of the contractual provisions contained in the Decision and Order of the Panel issued on November 30, 2011, in Case No. 10 FSIP 119, specifically what was then Article 1, Section 6 and is now designated as Article 1, Section 5, which were supposed to be included in the negotiated agreement of the National Park Service and the National Treasury Employees Union and notify the parties of such in writing.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured them by the Statute.

_____
(Agency/Respondent)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1400 K Street, NW., 2nd Flr., Washington, DC 20424, and whose telephone number is: (202) 357-6029