FEDERAL LABOR RELATIONS AUTHORITY OALJ 15-48
Office of Administrative Law Judges
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION OFFICE OF DISABILITY ADJUDICATION WASHINGTON, D.C. RESPONDENT AND ASSOCIATION OF ADMINISTRATIVE LAW JUDGES CHARGING PARTY	Case No. WA-CA-14-0068

Brent S. Hudspeth
For the General Counsel

Eddie Taylor
For the Respondent

Diana M. Bardes
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

On September 8, 2014, the Regional Director of the Atlanta Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing alleging that the Social Security Administration, Office of Disability Adjudication, Washington, D.C. (Respondent) violated § 7116(a)(1) and (6) of the Federal Service Labor-Management Relations Statute (Statute) when it implemented eleven articles ordered by the Federal Services Impasses Panel (Panel) to be part of the successor collective bargaining agreement (CBA) between the Respondent and the Association of Administrative Law Judges (Union) prior to the Union having an opportunity to ratify the other articles that made the successor CBA. G.C. Ex. 1(b).

On October 20, 2014, the Respondent filed an Answer admitting certain facts but denying it violated the Statute. On November 14, 2014, the General Counsel (GC) filed a Motion for Summary Judgment (MSJ). On November 21, 2014, the Union also filed a Motion for Summary Judgment, and on the same date, the Respondent filed a Motion to Dismiss or alternatively, a Motion for Summary Judgment and Opposition to the GC's Motion for Summary Judgment. On December 8, 2014, the Union filed an Opposition to the Respondent's Motion for Summary Judgment. The GC filed a Motion to Postpone the Hearing Pending Ruling on its MSJ, which was granted.

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 motion for summary judgment 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 General Counsel's and the Union's motions, the Respondent's opposing motion, and the evidence submitted therewith, I have determined that summary judgment is appropriate. I find that the Respondent did not violate § 7116(a)(1) and (6) of the Statute by implementing the eleven articles ordered by the Panel to be part of the parties' successor CBA prior to the Union ratifying the articles successfully negotiated by the parties prior to submitting the disputed articles to the Panel.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(4) of the Statute. G.C. Ex. 1(b), 1(c). The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit of Respondent's employees appropriate for collective bargaining. *Id.*

The Union and Respondent entered into their first collective bargaining agreement in 2001. G.C. Ex. 2. On February 10, 2010, the parties entered into a Memorandum of Understanding (MOU) on ground rules for the negotiation of a successor CBA. G.C. Ex. 2, Attach. 1; R. Ex. 2. The MOU provides:

> As the parties reach tentative agreements on contract articles, the Chief Negotiators or designees and up to two (2) additional members of each Negotiating Team will signify tentative agreement by signing and dating those articles with the understanding that none becomes effective until the parties agree upon the final version of the new CBA.

> The Union shall have sixty (60) calendar days after signature of the new CBA to ratify. The Agency will provide the Union 1,200 ratification copies of the new CBA. If the new CBA is
>
> not ratified, the parties will resume negotiations on the entire new CBA within thirty (30) days of non-ratification, unless otherwise agreed to by the parties. The parties agree to pay their own costs and expense for these negotiations.

G.C. Ex. 2, Attach. 1; R. Ex. 2.

Negotiations upon a successor CBA took place in 2010 and 2011. G.C. Ex. 2; R. Ex. 1. Bargaining took place on 93 days over 25 different weeks. G.C. Ex. 2, Attach. 2; R. Ex. 1. During the negotiations between the parties, and with the assistance of a mediator from the Federal Mediation and Conciliation Service (FMCS), the parties reached agreement with respect to twenty articles through negotiation.[1] *Id.*

On March 2, 2012, the Executive Director of the Panel, issued a procedural determination letter in Case No. 12 FSIP 54, asserting jurisdiction over "all unresolved issues in the parties' negotiations over a successor collective-bargaining agreement" and directed the parties to resolve the dispute in accordance with 5 C.F.R. § 2471.6 (a)(2). R. Ex. 3. The Panel ordered the parties to resume bargaining assisted by a private mediator/fact finder of their choice. *Id.* The Panel specified that if issues remained unresolved at the conclusion of mediation, the fact finder would submit a written report with recommendations for resolution. *Id.* The Panel also indicated that in the event a party did not accept the fact finder's recommendations for resolution, the party should notify the Panel in writing. *Id.* The letter then indicated that the Panel "shall take whatever action it deems appropriate to resolve the issues." *Id.*

The parties remained in dispute over twelve proposed articles and selected Ira F. Jaffe to serve as their mediator/fact finder. G.C. Ex. 2; R. Ex. 1. (Proposed Articles 5, 9, 14, 15, 19, 20, 21, 23, 25, 27, 30, 35) R. Ex. 1. During the mediation/fact finding phase ordered by the Panel, the parties agreed to eliminate one proposed article (Article 35), and reached complete agreement on four of the articles. (Articles 14, 20, 23, 25). *Id.* On October 15, 2012, Jaffe issued a report with recommendations to resolve the proposed articles upon which the parties had not reached agreement. (Articles 5, 9, 15, 19, 21, 27, 30). *Id.* The report and recommendations provided that the successor CBA would consist of: "(1) the Articles agreed to prior to Mediation; (2) the Articles and partial Articles agreed to in Mediation; and (3) the additional language that will be ordered by the Panel in the remaining disputed areas that are referenced in this Report and Recommendations." *Id.* In his report, Jaffe noted that "the

[1] Although the Complaint and Notice of Hearing indicates eighteen articles were agreed upon, the Report and Recommendations of the Mediator/Fact Finder indicate the number of articles agreed upon prior to the Panel accepting jurisdiction were twenty.

Recommendations in this Fact-Finding Report [were] inter-related and integrally connected with many of the items as to which agreement was reached, both prior to and during the Mediation process." *Id.* Jaffe added that "[w]hile the Recommendations stand on their own as independently appropriate, they are part of an integrated series of provisions that, in the aggregate, form what I believe is a fair and appropriate successor Agreement." *Id.*

The Respondent accepted all of the recommendations set forth in the report issued by Jaffe. R. Ex. 4. The Union rejected most of the recommendations and proposed alternative wording for the articles resolved by Jaffe's report and recommendations. *Id.* In response to the Union's rejection, the Panel issued an Order to Show Cause directing the Union to submit a statement of position, showing why Jaffe's recommendations should not be accepted and why the Union's alternative recommendations should be adopted. *Id.*

On April 30, 2013, the Panel issued a Decision and Order, which concluded that the Union failed to show cause why Jaffe's recommendations should not be imposed. R. Ex. 5. In the Decision, the Panel ordered the parties to adopt the recommendations in the report in their entirety. *Id.*

On June 6, 2013, Dennis O'Leary, Chief Negotiator for the Respondent, emailed Mark Brown, Chief Negotiator for the Union, to inquire about the timetable for the Union's ratification vote on the successor CBA. R. Ex. 6. On June 14, 2013, Brown replied to O'Leary, indicating that the list of articles sent to the Union for ratification was incomplete. *Id.* In an email dated June 19, 2013, Brown expressed the Union's contention that all eleven of the proposed articles submitted to the Panel required ratification, because four were agreed to by the parties after the Panel asserted jurisdiction, and "only shorter portions" of the other seven articles were not agreed to. *Id.* Therefore, the Union argued that the bulk of those seven articles also required Union ratification. *Id.* Brown then added that "the [two] sides have to agree upon the final version of the agreed upon language before we can submit anything to ratification." *Id.*

On June 18, 2013, O'Leary notified Brown that the Respondent was "going to go ahead with implementing the aforementioned Articles," indicating that the Respondent was going to implement all of the articles resolved after the Panel asserted jurisdiction (Articles 5, 9, 14, 15, 19, 20, 21, 23, 25, 27, 29).[2] *Id.* Brown responded by citing language in the parties' ground rules agreement that the parties were required to "agree upon the final version of the new CBA," and that the Union had "60 calendar days after signature of the new CBA to ratify." *Id.* Brown asserted that the Union had the right to ratify all of the language in the articles submitted to the Panel which the parties had agreed upon except the language specifically imposed by the Panel. *Id.*

[2] At the time of this email, the original proposed Article 30, Facilities and Services had been renumbered to Article 29.

On July 29, 2013, Brown emailed Thomas Funciello, the Respondent's Associate Commissioner for the Office of Labor and Management and Employee Relations, stating that it would be "illegal" for the Respondent to implement the eleven articles submitted to the Panel. R. Ex. 7. Brown asserted that the Respondent was required to provide the Union with all eleven articles for review, "so we can agree on the final wording of the complete contract." *Id.*

On September 30, 2013, Funciello emailed Brown and notified him that the eleven articles (Articles 5, 7, 9, 14, 15, 19, 20, 21, 23, 25, 29)[3] submitted to the Panel and resolved through the mediation/fact finding that resulted in the Panel's Decision and Order were not subject to ratification by the Union and were thus implemented as of that date. R. Ex. 8.

POSITIONS OF THE PARTIES

General Counsel

The GC contends that the Respondent violated the Statute by implementing the Articles ordered by the Panel prior to the successor CBA's ratification and implementation. The GC argues that the parties were negotiating a single collective bargaining agreement, not a series of independent agreements. The GC cites *Patent Office Prof'l Assoc.*, 41 FLRA 795 (1991) (*Patent Office*), where the Authority held that it is "the agreement," not a portion thereof, that is subject to agency head approval under § 7114(c). The GC contends that the Respondent cannot subject individual articles or section of a collective bargaining agreement to the agency head review process under § 7114(c). Rather, the entire collective bargaining agreement must be subjected to the agency head review process. The GC asserts that the Respondent in this case was not permitted to implement a portion of the successor CBA without consent from the Union.

The GC argues that the Respondent's breach of the parties' ground rules agreement violated the Respondent's duty to bargain in good faith with the Union over a successor CBA. The GC asserts that the Respondent's breach of the ground rules was clear and patent, and is fundamental to the Union's rights under the Statute. The GC contends that the Respondent's breach of the ground rules amounted to a repudiation of that agreement, which the Authority has held to be an unfair labor practice.

The GC contends that the language in the parties' ground rules agreement specifically prohibited the Respondent from implementing the eleven articles submitted to the Panel for resolution. The GC points out that the ground rules provided that no articles "becomes effective until the parties agree upon the final version of the new CBA." R. Ex. 2. The GC asserts that this means none of the provisions in the successor CBA can go into effect until the entire successor CBA goes into effect.

[3] At the time of this email, the original proposed Article 30, Facilities and Services remained enumerated as Article 29.

The GC asserts that neither the Panel's Decision and Order nor the Panel's regulations required the implementation of Panel ordered provisions prior to the successor CBA going into effect. The GC observes that the mediator/fact finder's report and recommendations stressed that the provisions would be included in the "new agreement" and the "successor agreement," which did not yet exist. The GC argues that the report contemplated that provisions imposed by the Panel would not go into effect until the full successor CBA was ratified and implemented after agency head review.

As a remedy, the GC requests a cease and desist order. The GC asks that the eleven articles implemented by the Respondent be rescinded and that Respondent be ordered to reinstate the articles from the prior CBA. The GC also requests that the Respondent be ordered to make whole any bargaining unit employees adversely affected by the implementation of the eleven articles and that a nationwide posting be ordered.

Union

The Union argues that the Respondent violated the Statute by implementing a portion of the successor CBA that was not finalized or ratified, nor underwent agency head review. The Union contends that a head of an agency must consider a collective bargaining agreement as a whole, because "to hold otherwise would produce chaotic results." *Patent Office*, 41 FLRA at 802. The Union argues that the ground rules between the parties specifically contemplated a situation where the successor CBA could be disapproved during agency head review. The ground rules provide that if any provisions are disapproved by agency head review, "the parties will commence renegotiation within a reasonable period." R. Ex. 2. The Union asserts that if the Respondent were allowed to implement certain portions of an agreement while others were disapproved by the agency head, then the Respondent would reap the benefit of the implemented articles while forcing the Union to renegotiate the disapproved articles. The Union contends that the Panel Order did not indicate that the ordered provisions had to be implemented within a certain time period. Instead, the mediator/fact finder stated that the disputed provisions resolved by his report would be part of the successor CBA whenever the successor agreement went into effect. The Union asserts that the eleven articles submitted to the Panel cannot be implemented without the existence of a successor CBA.

The Union also argues that the Respondent also violated the Statute by repudiating the parties' ground rules MOU. In determining whether a party has repudiated an agreement, the Authority examines: (1) the nature and scope of the agreement breached, meaning whether the breach was clear and patent; and (2) the nature of the agreement provision breached, meaning whether the provision went to the heart of the parties' agreement. *Dep't of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858, 862 (1996) (*Air Force*). The Union contends that the ground rules MOU clearly requires that no articles "become effective until the parties agree upon the final version of the new CBA," but that the Respondent implemented the eleven articles before the parties agreed upon the final version of the new CBA. The Union also asserts that the ground MOU required that the new CBA be ratified by the Union and subject to agency head review. The Union contends neither requirement was met when the Respondent implemented the eleven articles.

Regarding whether the breach went to the heart of the agreement, the Union argues that the Respondent's breach of the ground rules related directly to the purpose of the ground rules MOU. The Union asserts that the ground rules MOU was put in place to set the procedures to negotiate, execute, and implement a successor CBA. The Union argues that the Respondent ignored the procedures for executing and implementing the successor CBA when it unilaterally implemented the eleven articles.

The Union contends that even if it was lawful for the Respondent to implement the seven articles containing language imposed by the Panel, the Respondent still violated the Statute by implementing the four articles that were fully agreed upon by the parties in the mediation/fact finding phase after the Panel asserted jurisdiction. The Union asserts that the Panel's Decision and Order does not address the four articles that were agreed to with assistance from the mediator/fact finder. Jaffe's report only addressed the "remaining issues in dispute." The Union contends that by implementing the four articles agreed to by the parties, the Respondent deprived the union membership of its right to ratify or reject those articles before they were implemented.

Respondent

The Respondent argues that the complaint does not state a claim that is within the jurisdiction of the Authority and should be dismissed, or alternatively, that it fulfilled its duty to bargain and is entitled to summary judgment in its favor. The Respondent asserts that its actions have been consistent with its duty to bargain in good faith and that the GC's MSJ should be denied.

The Respondent contends that there is no statutory right to bargain over a final action of the Panel. The Respondent asserts that the parties have a statutory obligation to cooperate and comply with the Panel's Order. 5 U.S.C. § 7116(a)(6), (b)(6). The Respondent submits that the Panel's final and binding Order required the parties to adopt the mediator/fact finder's recommendations on the disputed proposals, and there is no obligation to further bargain over the matters covered by the Order. The Respondent argues that since there is no right to bargain over matters resolved by a Panel Order, the complaint fails to state a claim. Additionally, the Respondent asserts there is no right for bargaining unit employees to ratify proposals resolved by a Panel Order. The Respondent contends that since the Panel's order did not require ratification by the Union, the Complaint fails to state a claim within the Authority's jurisdiction.

In the alternative, the Respondent argues that even if there was an obligation to bargain after the Panel's Order was issued on April 30, 2013, the Respondent satisfied that obligation. The Respondent contends that it notified the Union on June 18, 2013, that it would comply with the Panel's Order. The Union did not make a demand to bargain in response, it instead contended that the Respondent's actions were "illegal." In failing to demand bargaining, the Respondent argues that the Union waived its right to bargain the implementation of the eleven articles submitted to the Panel for impasse resolution.

The Respondent refutes the GC's contention that the Respondent violated the Statute by unilaterally implementing the eleven articles without the Union's consent. The Respondent asserts that implementing a Panel Order is not the same as implementing portions of an agreement disapproved by the head of an agency under 5 U.S.C. § 7114. The Respondent contends that the Panel's impasse resolution process is entirely different from the agency head review, and therefore, *Patent Office*, is not applicable. Under the agency head review process, if the agency head approves an agreement or fails to disapprove of it within thirty days, the entire agreement becomes effective, and if the agency head disapproves any portions of the agreement, the parties resume negotiations on the entire agreement.

In contrast, the Respondent asserts that when the Panel issues a decision and order, it is final and binding unless the agency head disapproves it within thirty days. The Respondent argues in this case that when the agency head did not disapprove the eleven articles covered by the Panel's Order within thirty days, they became effective as final and binding on the parties. The Respondent points out that the Authority has consistently held an agency violates 5 U.S.C. § 7116(a)(6) when it fails to implement a Panel Order.

The Respondent submits that the Authority has never found the implementation of a Panel Order to be an unfair labor practice because doing so would undermine the ability of the Panel to render final and binding decisions to resolve impasses. The Respondent contends that the Union failed to submit the agreed upon articles to its membership for ratification after it had the opportunity to do so, which resulted in the eleven Panel imposed articles being implemented separately. The Respondent notes that it waited six months after the Panel Order issued for the Union to hold a ratification vote on the twenty agreed upon articles, and the Union failed to seek ratification during that period.

The Respondent also submits that it did not violate the parties' ground rules MOU when it implemented the eleven articles that were the subject of the Panel's Order. The Respondent contends the ground rules MOU did not contemplate going to the Panel for impasse resolution. The Respondent argues that even if the implementation of the eleven articles submitted to the Panel violated the ground rules MOU, it did not constitute a repudiation of the agreement because there was no "clear and patent" breach. The Respondent contends the portion of the MOU stating that "none [of the articles] becomes effective until the parties agree upon the final version of the new CBA," contemplates a situation where the parties agreed upon the final version of the successor CBA in total. However, when the Panel issued an Order resolving the eleven articles at impasse, the parties were never going to "agree" on a final version of the successor CBA because it would include language imposed by the Panel Order. The Respondent argues that when the Panel issued its Decision and Order on April 30, 2013, the final version of the successor CBA was complete, consisting of the eleven articles submitted to the Panel for impasse resolution, and the twenty articles previously agreed upon by the parties. Therefore Respondent asserts that it did not violate the requirement that "none [of the articles] becomes effective until the parties upon the final version of the new CBA." R. Ex. 2. The Respondent contends that the

interpretation of the ground rules MOU proffered by the GC and Union would undermine the Panel's authority to issue a final and binding decision because either party could claim not to "agree" to the Panel ordered articles and forever delay implementation of the successor CBA. The Respondent contends that it acted in accordance with a reasonable interpretation of the ground rules MOU and did not clearly and patently breach the agreement.

Finally, the Respondent maintains that even if a violation is found, the GC's requested relief should be denied. The Respondent asserts if the GC's theory that the eleven articles submitted to the Panel for impasse resolution should not have been implemented until the agreed upon articles were ratified, then the proper remedy is to order a ratification vote.

DISCUSSION

The Federal Service Impasses Panel is a component within the Authority that provides assistance in resolving negotiation impasses between agencies and exclusive representatives. 5 U.S.C. § 7119(c)(1). The Panel is empowered to recommend a course of action, such as mediation, to resolving negotiation disputes. If the parties remain in dispute after pursuing the Panel's recommended course of action, the Panel has the authority to "take whatever action is necessary . . . to resolve the impasse." 5 U.S.C. § 7119(c)(5)(B)(iii); *U.S. DOJ, INS*, 31 FLRA 1123 (1988). This includes unilaterally imposing disputed contract terms on the parties. *See AFGE, AFL-CIO v. FLRA*, 778 F.2d 850, 857 (D.C. Cir. 1985).

In the course of negotiating the parties' successor CBA, the Union and the Respondent reached agreement on twenty Articles with the assistance of a mediator from FMCS. R. Ex. 1. The Union then sought assistance from the Panel to settle the remaining unresolved articles. G.C. Ex. 2. The Panel accepted jurisdiction "over all unresolved issues in the parties' negotiations over a successor collective bargaining agreement" and directed the parties to pursue a hybrid mediation/fact finding process. R. Exs. 1, 3. The mediator/fact finder then issued a report resolving the remaining disputed items in the parties' successor CBA. R. Ex. 1. The Respondent accepted the mediator/fact finder's recommendations but the Union did not. R. Ex. 4. The Panel issued an Order to Show Cause directing the Union to submit a statement of position showing cause as to why the mediator/fact finder's recommendations should not be imposed by the Panel. R. Ex. 4. The Panel then issued a Decision and Order which adopted the mediator/fact finder's recommendations in their entirety. *SSA, Office of Disability Adjudication & Review, Balt., Md.*, Case No. 12 FSIP 54 (2013); R. Ex. 5.

The Report and Recommendations, was adopted in its entirety by the Panel, and ordered the parties' successor CBA to consist of: "(1) the Articles agreed to prior to Mediation; (2) the Articles and partial Articles agreed to in Mediation; and (3) the additional language that will be ordered by the Panel in the remaining disputed areas that are referenced in this Report and Recommendations." R. Ex. 1. Once the Panel issued the Decision and Order adopting the Report and Recommendations, neither the Respondent nor the Union was required to negotiate further over the articles submitted to the Panel for resolution as the Decision and Order in 12 FSIP 54 constituted a final action by the Panel. 5 C.F.R. § 2471.11(a); R. Ex. 5. 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). There is no contention that the parties reached an agreement to not be bound by the Panel's Order after it was issued as permitted by 5 C.F.R. § 2471.11(d). Thus, the Respondent and Union were bound by the Panel's Decision and Order and the argument that the parties ground rules MOU constituted a pre-impasse agreement to disregard any subsequent Panel Order is not only specious, but entirely inconsistent with the process established to resolve impasses. Parties are not required to agree, nor are they required to negotiate to impasse, but if they do, the Panel determines the process and not the parties. Permitting the parties to agree in advance to ignore an Order from the Panel would eviscerate the impasse process.

After the Panel issued the Order, the Respondent asked the Union multiple times about the status of the Union's ratification of the other twenty Articles agreed upon before the Panel assumed jurisdiction. R. Ex. 6. However, the Union declared that it would not submit the twenty Articles to its membership for ratification because the eleven Articles resolved by the Panel had to be included in the agreement submitted to the bargaining unit for ratification. *Id.* On September 30, 2013, in accordance with the Panel's Decision and Order, the Respondent implemented the eleven Articles resolved by the Panel. R. Ex. 8.

As noted above, a final action of the Panel is binding upon the parties and it is an unfair labor practice for an agency or union to fail or refuse to cooperate in impasse procedures and impasse decisions made by the Panel. 5 U.S.C. § 7116(a)(6), (b)(6); *See e.g., U.S. Dep't of the Treasury, IRS*, 23 FLRA 774, 777-78 (1986) ("The Authority has consistently held that an agency's refusal to implement a Decision and Order of the Federal Service Impasses Panel requiring the parties to adopt language in their collective bargaining agreement violates § 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."). Here, the Respondent implemented the eleven Articles resolved by the Panel to comply with the Panel's Decision and Order. The Respondent would have been in violation of the Statute if it failed to take action to implement the Panel's Decision and Order. On the other hand, the Union continued to attempt to delay implementation of the contractual language it previously rejected by insisting that the eleven Articles, with the exception of the language specifically imposed by the Panel, be submitted to the Union's membership for ratification of the successor CBA. R. Ex. 6.

However, as conceded by the General Counsel, the eleven articles implemented by the Respondent in accordance with the Panel's Decision and Order were not required to be ratified by the Union's membership. *See* R. Ex. 9 (citing *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1498 (D.C. Cir. 1984)). Neither the GC nor the Union has cited a case where the Authority found a violation of the Statute by an Agency for implementing a final order of the Panel. 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). If a Panel order was subject to ratification by a union, that "final action" by the Panel would not actually put an end to an impasse. A rejection through union ratification vote of contract provisions

proscribed by Panel order would nullify the binding effect of the order and would not resolve the dispute. This would be inconsistent with the Congressional intent that Panel orders provide a "means for resolving collective bargaining impasses" and an alternative to various forms of "labor unrest." *U.S. Dep't of the Air Force, AFMC*, Case Nos. CH-CA-60398 & CH-CO-60608, ALJ Dec. Rep. No. 137 (1998).

The General Counsel's main contention is that the Respondent violated the Statute in this case by implementing the eleven articles imposed by an Order of the Panel without the entire agreement going through the agency head review process as required by § 7114(c) of the Statute. It is well established that under § 7114(c) of the Statute, an agreement between an agency and an exclusive representative shall be subject to approval by the head of the agency. The agency head is required to act within thirty days from the date that the agreement is executed. If the agency head does not approve or disapprove the agreement within the thirty-day period, the agreement takes effect automatically on the thirty-first day. *See Patent Office*, 41 FLRA at 802. Where an agency head timely disapproves an agreement under § 7114(c) of the Statute, the agreement does not take effect and is not binding on the parties. *Id.*

The General Counsel relies on *Patent Office*, in which the Authority stated that for purposes of the agency head review process under § 7114(c), an agreement should be treated as an "integrated and complete document rather than as a collection of articles and sections." *Id.* at 802. However, the Authority's holding in that case concerned a procedural issue in a negotiability dispute as to the timeliness of an agency head's disapproval of a collective bargaining agreement. The present case is not a negotiability dispute nor does it concern the timeliness of an agency head's disapproval of a collective bargaining agreement pursuant to § 7114(c). There is no contention that the Respondent's agency head disapproved any portion of the eleven Articles imposed by the Panel and therefore the timeliness of agency head disapproval is not at issue. The issue in this case, as alleged in the Complaint, is whether the Respondent violated the Statute by implementing articles ordered by the Panel prior to the Union's ratification of the twenty articles agreed upon before the Panel asserted jurisdiction. G.C. Ex. 1(b). The case relied upon by the General Counsel, *Patent Office* is inapplicable. To hold that an agency violates the Statute by implementing Panel ordered provisions without the Union's ratification of the entire agreement would diminish the Panel's ability to effectively resolve an impasse. In a case such as the present one where the union did not agree with the Panel's decision, the union could indefinitely delay implementation of the new CBA, including the Panel ordered provisions, by refusing to ratify those provisions that were subject to ratification. This is incongruous with the Panel's purpose of imposing final resolution for negotiation impasses.

Although not charged as a violation in the Complaint issued by the GC, the GC and Union contend that the Respondent repudiated the parties' ground rules MOU by implementing the Panel ordered articles. In determining whether a party has repudiated a contract, the Authority examines: (1) the nature and scope of the agreement breached, meaning whether the breach was clear and patent; and (2) the nature of the agreement provision breached, meaning whether the provision went to the heart of the parties' agreement. *See Air Force*. In this case, no repudiation occurred because the Respondent's

action did not constitute a clear and patent breach of the terms of the ground rules MOU. The ground rules MOU required that none of the articles could be implemented until the entire successor CBA was "agreed upon," "ratified by the Union," and passed agency head review. G.C. Ex. 2, Attach. 1. However, once the parties reached impasse and submitted the remaining articles of the successor CBA to the Panel for resolution, the parties are bound by the Panel's resolution of the disputed articles. After the process moved from FMCS mediation to Panel jurisdiction, the parties were no longer "negotiating" over the successor CBA, negotiations were at impasse. Therefore the parties were not going to "agree" upon the final version of the successor CBA as required by their ground rules MOU, since the successor CBA would contain language imposed by the Panel. The Respondent's interpretation that the ground rules did not require the parties to "agree upon the final version of the new CBA" before any of the Articles could become effective was reasonable. When the meaning of a particular term in an agreement is unclear, acting in accordance with a "reasonable interpretation" of that term, even if it is not the only reasonable interpretation does not constitute a clear and patent breach of the terms of the agreement. *Air Force*, 51 FLRA at 858, 862. Accordingly, I find the Respondent's act of in implementing the eleven articles imposed by the Panel's Order was not a repudiation of the parties ground rules MOU.

The Union contends that even if it were lawful for the Respondent to implement the articles containing language imposed by the Panel, the Respondent nevertheless violated the Statute by implementing the four articles agreed to in mediation before the Panel's mediator/fact finder. Here, the parties were at impasse with respect to twelve articles when the Panel asserted jurisdiction over "all unresolved issues in the parties' negotiations over a successor collective bargaining agreement." R. Ex. 4. The Panel was empowered to resolve the remaining disputes regarding those articles. The Report and Recommendations adopted by the Panel ordered that the new successor CBA include "the Articles and partial Articles agreed to in Mediation." R. Ex. 1. The four articles agreed to in mediation were specifically ordered by the Panel to be included in the parties' successor CBA. As discussed above, the articles implemented pursuant to a Panel Order are final and binding and not subject to ratification by the Union. Therefore, the Respondent did not violate the Statute by implementing the four articles agreed to after the Panel asserted jurisdiction. In short, the Respondent fulfilled its obligation to bargain in good faith and its compliance with the Panel's Order did not violate § 7116(a)(1) and (5) of the Statute.

CONCLUSION

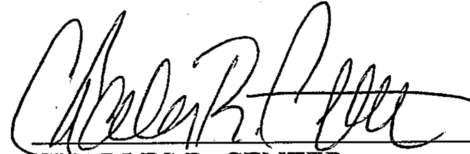
The record demonstrates the Respondent did not violate § 7116(a)(1) and (6) of the Statute when it implemented eleven contract articles the Panel ordered to be part of the successor CBA between the Respondent and Union.

Accordingly, I recommend that the Authority grant the Respondent's Motion for Summary Judgment, deny both the General Counsel's and Union's Motions for Summary Judgment, and dismiss the Complaint.

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., September 15, 2015



CHARLES R. CENTER
Chief Administrative Law Judge