

72 FLRA No. 116

UNITED STATES
DEPARTMENT OF DEFENSE
DOMESTIC DEPENDENT ELEMENTARY AND
SECONDARY SCHOOLS
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
STATESIDE REGION
(Union)

0-AR-5590

DECISION

December 20, 2021

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and James T. Abbott, Members
(Chairman DuBester concurring)

I. Statement of the Case

In this case, we remind the federal labor-management community that Federal Service Impasses Panel (Panel) orders are not directly reviewable.

The parties submitted unresolved bargaining issues for their new successor master labor agreement (successor MLA) to the Panel. The Panel issued an order imposing several provisions on the parties.¹ Subsequently, the Agency submitted the successor MLA, containing the Panel-imposed provisions, for Agency-head review. The Agency head approved the successor MLA, and the Agency implemented that agreement.

The Union submitted two grievances concerning the submission of the successor MLA for Agency-head review and the implementation of that agreement. The parties agreed to consolidate the grievances, and the grievances proceeded to arbitration. Arbitrator Neal Orkin determined that the Panel did not have jurisdiction over one of the imposed provisions – Article 18, Section 3(f) – and, therefore, the parties had not concluded bargaining. Consequently, the Arbitrator found that the Agency committed unfair labor practices

¹ *In re DOD, Educ. Activity, Domestic Dependent Elementary & Secondary Schs.*, 18 FSIP 073 (2018) (Panel Order).

(ULPs) by refusing to continue negotiations; submitting an unexecuted agreement for Agency-head review; and repudiating the parties' 2005 master labor agreement (2005 MLA) when it implemented the successor MLA.

For the reasons that follow, we find that the award is contrary to §§ 7119 and 7114 of the Federal Service Labor-Management Relations Statute (the Statute),² and we set it aside.

II. Background and Arbitrator's Award

In 2010, the parties started negotiating a successor MLA to replace their 2005 MLA. Soon after, the parties implemented ground rules stating, in relevant part, that "[o]nce agreement is reached on all proposals/provisions of the [successor MLA], and it is signed, the agreement will be formally executed (signed and dated) and submitted for Agency[-h]ead review."³ In 2015, the parties reached a new ground-rules agreement through a Memorandum of Understanding that added, "Except by mutual agreement, all agreed upon [a]rticles . . . remain agreed and not subject to further modification" but "[p]arties reserve the right to modify their proposals concerning any [a]rticle . . . to which the parties have not yet reached agreement."⁴

In 2018, the Agency requested the Panel's assistance in resolving the parties' impasse over the final forty unresolved issues of the successor MLA. With the Panel's assistance, the parties were able to voluntarily resolve thirty issues, including Article 18, Section 1(a), which concerned the number of hours in the workday.

Regarding the ten remaining issues, the Panel directed the parties to file written submissions for a Panel decision. The Union's written submission alleged that the Panel did not have jurisdiction over Article 18, Section 3(f)⁵ because another article – Article 11⁶ – already "cover[ed]" the topic of compensating teachers for extra workdays.⁷ However, on December 14, 2018,

² 5 U.S.C. §§ 7114, 7119.

³ Award at 14.

⁴ *Id.* at 3.

⁵ Article 18, Section 3(f) states that "[i]f the Agency closes schools on days that are assigned as work days as a part of the work year, due to inclement weather or other emergency, the Agency may extend the work year for an equal number of days without additional compensation to employees." Exceptions, Ex. 1, 2019 Master Labor Agreement at 98.

⁶ Article 11, Section 5(b) states that "[i]n the event school is closed during the school year, the Agency may re-schedule the day(s) lost from non-instructional days or extend the work year of seasonal employees. For any work assigned by the Agency under these circumstances outside the work[year/day] employees will be paid his or her [earned hourly rate]." *Id.* at 63.

⁷ Panel Order at *3.

the Panel issued an order on all ten issues, including Article 18, Section 3(f). In that order, the Panel determined that no conflict existed between Article 11 and Article 18, Section 3(f).⁸

Shortly after the Panel issued its order, the Agency requested that the Union sign what the Agency considered to be the completed successor MLA. The Union refused to sign, so the Agency submitted the successor MLA for Agency-head review. On January 11, 2019, the Agency head approved the successor MLA.

In February 2019, the Union filed a grievance alleging that the Agency had engaged in bad-faith bargaining under § 7116(a) of the Statute by submitting an unexecuted agreement, the successor MLA, to the Agency head.⁹ Thereafter, the Agency notified the Union that the effective date of the successor MLA was January 11, 2019—the date that the Agency head approved the agreement. The Union filed a second grievance, alleging that the Agency had unlawfully repudiated the 2005 MLA. As part of this grievance, the Union also disputed the Panel’s jurisdiction over Article 18, Section 3(f).¹⁰ The parties consolidated the grievances, and the dispute proceeded to arbitration.

While the grievances were pending, the Union notified the Agency that Article 18, Section 1(a) was unenforceable, and, as a result, the Union was withdrawing from the agreement that the parties had previously reached on that section.¹¹

⁸ *Id.* at *5 (finding that Article 18 establishes a “190-day work year” and Article 11 was meant to address compensation beyond the 190-day work year requirement).

⁹ 5 U.S.C. § 7116(a).

¹⁰ See Exceptions, Ex. 5, Ag. Ex. 3 (Union’s Second Grievance) at 1 (“[The Union] would not execute a final agreement until the parties have finalized the unsigned [a]rticles and resolved the dispute over [the Panel’s] jurisdiction . . . to adopt the Agency’s proposed Article 18, [S]ection 3(f).”).

¹¹ The Union based its conclusion that Article 18, Section 1(a) was unenforceable on *DOD, Domestic Dependent Elementary & Secondary Schools., Fort Buchanan, Puerto Rico*, 71 FLRA 127 (2019) (*Fort Buchanan*) (then-Member DuBester dissenting), in which the Authority held that the workday provision was nonnegotiable. See Exceptions, Ex. 14, Agency Ex. 12 (Union’s withdrawal from Article 18, Section 1(a) at 1-2 (citing *Fort Buchanan* and the ground-rules agreement to allow the Union to withdraw Article 18, Section 1(a) because Article 18 was unresolved). However, the United States Court of Appeals for the District of Columbia Circuit reversed the Authority’s determination that the workday provision was nonnegotiable. See *Antilles Consol. Educ. Ass’n v. FLRA*, 977 F.3d 10, 17 (D.C. Cir. 2020); see also *DOD, Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, P.R.*, 72 FLRA 414, 415 (2021) (Chairman DuBester concurring; Member Abbott dissenting) (vacating the portions of *Fort Buchanan* “that dealt exclusively with finding that the workday provision was nonnegotiable”).

The Arbitrator framed the issues, in relevant part, as: “Is Article 18, Section 3(f) of the [successor] MLA [e]nforceable, and [w]as the Union’s [w]ithdrawal [f]rom [i]ts [p]revious [a]pproval of Article 18, Section 1(a) [v]alid?”¹²

The Arbitrator noted that although the Panel resolved the impasse over Article 18, Section 3(f), the Union refused to abide by the Panel’s order and filed grievances contesting the Panel’s jurisdiction.¹³ On this matter, the Arbitrator further remarked that the Agency “had the right to file [ULP] charges against the Union when the Union refused to sign the [s]uccessor MLA . . . [and] refus[ed] to implement [the Panel’s order],” but the Agency “chose not to.”¹⁴

Addressing Article 18, Section 3(f), the Arbitrator found that it was a “permissive subject of bargaining” because the subject matter – teacher compensation for extra workdays – was “covered by Article 11.”¹⁵ As a result, the Arbitrator concluded that Article 18, Section 3(f) was unenforceable. Based on that unenforceability finding, the Arbitrator made several other related determinations. In particular, the Arbitrator held that (1) the Panel “should not have issued a decision ordering the parties to accept the Agency’s proposed version of Article 18, Section 3(f);”¹⁶ (2) because bargaining over Article 18 as a whole was unfinished, the Union was permitted by the ground rules to withdraw from Article 18, Section 1(a); (3) with multiple sections of Article 18 unresolved, the Agency violated the ground-rules agreement and the Statute by ending bargaining and submitting an unsigned agreement for Agency-head review; and (4) by implementing the successor MLA, the Agency repudiated the 2005 MLA in violation of the ground-rules agreement and the Statute.

As remedies, the Arbitrator directed that the 2005 MLA remain in effect, and directed the parties to bargain over the unresolved bargaining issues in the successor MLA. Additionally, the Arbitrator retained

¹² Award at 6.

¹³ See *id.* at 10 (“The Union refused to honor [the Panel’s] decision to implement the unsigned [successor] MLA, and sought arbitration to settle this dispute.”); Union Post-Hr’g Br. at 29 (“[I]t is the [Union’s] position that [the Panel] lacked jurisdiction over [Article 18, Section 3(f)].”); *id.* at 39 (“[The Panel e]xceeded its [a]uthority [b]y adopting the Agency’s [p]roposed Article 18, Section 3(f)”); see also Tr. at 5 (“The [Union] believes that the [P]anel quite clearly exceeded its authority in the December 2018 order involving an impasse that occurred during bargaining.”); *id.* at 27 (“[T]he Union did not believe that the [P]anel had jurisdiction over [Article 18, Section 3(f)]”).

¹⁴ Award at 17.

¹⁵ *Id.* at 15.

¹⁶ *Id.*

jurisdiction to resolve any issues regarding the enforcement of the award, including backpay.

On February 3, 2020, the Agency filed exceptions to the award, and on March 3, 2020, the Union filed an opposition to the Agency's exceptions.¹⁷

III. Analysis and Conclusions

A. The award is contrary to § 7119 of the Statute.

The Agency alleges that the award is contrary to § 7119 of the Statute.¹⁸ Under § 7119, a final Panel order "shall be binding on [both] parties during the term of the agreement, unless the parties agree otherwise."¹⁹ The Authority has repeatedly stated that Panel orders are not directly reviewable by the Authority or the courts.²⁰ Instead, the Statute provides a particular avenue for parties to challenge a Panel order.²¹ Specifically, it is a ULP for an agency or a labor organization "to fail or refuse to cooperate in impasse procedures and impasse decisions."²² Only a party that fails or refuses to comply with a Panel order, and is consequently charged with a ULP, may then challenge the Panel's order.²³

Here, on the contrary, in order to challenge the Panel's order, the Union filed two grievances against the Agency.²⁴ In the second grievance,²⁵ and before the

Arbitrator, the Union contested the Panel's imposition of Article 18, Section 3(f)²⁶ by repeatedly claiming that the Panel "lacked jurisdiction"²⁷ or "exceeded its authority."²⁸ As the Arbitrator noted, although the Union refused to comply with the Panel's order, the Agency did not file a ULP charge against the Union.²⁹ The Union's grievances directly contesting the Panel's order fail to respect the statutory framework for review of Panel orders³⁰ and circumvent the procedure set in § 7119. As a result, the Union's grievance was inconsistent with § 7119.³¹

For similar reasons, the Arbitrator erred in reviewing and setting aside the Panel's order. The Union's failure to follow the "specific review procedure[]" established by the [S]tatute" for challenging the Panel's order³² precluded the Arbitrator from ruling on whether Article 18, Section 3(f) was unenforceable as a "permissive subject of bargaining" or because it was "covered by Article 11."³³

Therefore, we find the award contrary to § 7119.

jurisdiction . . . to adopt the Agency's proposed Article 18, [S]ection 3(f).").

²⁶ See Award at 10 ("The Union refused to honor [the Panel's] decision to implement the unsigned [successor] MLA, and sought arbitration to settle this dispute.").

²⁷ Union Post-Hr'g Br. at 29 ("[I]t is the [Union's] position that [the Panel] lacked jurisdiction over [Article 18, Section 3(f)].").

²⁸ *Id.* at 39 ("[The Panel e]xceeded its [a]uthority [b]y adopting the Agency's [p]roposed Article 18, Section 3(f) . . ."); see also Tr. at 5 ("The [Union] believes that the [P]anel quite clearly exceeded its authority in the December 2018 order involving an impasse that occurred during bargaining."); *id.* at 27 ("[T]he Union did not believe that the [P]anel had jurisdiction over [Article 18, Section 3(f)] . . .").

²⁹ See Award at 17 ("The Agency had the right to file [ULP] charges against the Union when the Union refused to sign the [s]uccessor MLA . . . [and] refus[ed] to implement [the Panel's order].").

³⁰ See 5 U.S.C. § 7116(a)(6); *Brewer*, 735 F.2d at 1499-1500.

³¹ See *State of N.Y., Div. of Mil. & Naval Affs.*, 2 FLRA 185, 188 (1979) ("It is clear, therefore, from the literal language of [§] 7116 of the Statute and the intent of Congress as expressed in the related legislative history, that under the Statute, Authority review of a final Panel Decision and Order . . . may be sought by the party objecting to that order *only after the filing of unfair labor practice charges by the other party*, based on noncompliance with the Panel's Decision and Order . . .") (emphasis added).

³² See *Brewer*, 735 F.2d at 1500 (noting that parties may appeal a Panel order under § 7123(a) of the Statute once the Authority issues a decision on a ULP charge for failing to comply with the Panel order); see also 5 U.S.C. § 7119.

³³ See Award at 15 (finding that the Panel "should not have issued a decision ordering the parties to accept the Agency's proposed version of Article 18, Section 3(f)"); see also Panel Order at *5 (finding that Article 18 establishes a "190-day work year" and Article 11 was meant to address compensation beyond the 190-day work year requirement).

¹⁷ In its opposition, the Union argues that the Agency's exceptions are interlocutory because the Arbitrator "declined to make a final determination regarding the back pay [that] bargaining[-]unit employees were entitled to . . . from the Agency's repudiation of the 2005 MLA." Opp'n Br. at 11. The Authority has held that an arbitrator's award is final where, as here, the arbitrator retains jurisdiction solely to assist the parties in the implementation of awarded remedies. *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1167 n.10 (2020) (then-Member DuBester concurring). Because the award is final, we review the Agency's exceptions. See *id.*

¹⁸ Exceptions Br. at 12-14. The Authority reviews questions of law raised by exceptions to an arbitrator's award de novo. *U.S. SEC, Wash., D.C.*, 61 FLRA 251, 253 (2005). In applying a standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.*

¹⁹ 5 U.S.C. § 7119(c)(5)(C).

²⁰ See *NTEU*, 71 FLRA 962, 962 (2020) (*NTEU*) (then-Member DuBester concurring); see also *Council of Prison Locs. v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (*Brewer*) ("[T]he [S]tatute gives every reasonable indication that orders by the . . . Panel are final and nonreviewable.").

²¹ *NTEU*, 71 FLRA at 962.

²² *Id.* (quoting 5 U.S.C. § 7116(a)(6)).

²³ *Id.* at 962-63.

²⁴ See Award at 3.

²⁵ See Union's Second Grievance at 1 ("[The Union] would not execute a final agreement until the parties have finalized the unsigned [a]rticles and resolved the dispute over [the Panel's]

- B. The award is contrary to § 7114 of the Statute.

The Agency also alleges that the award is contrary to § 7114 of the Statute.³⁴ Specifically, the Agency challenges the Arbitrator's determination that the Agency impermissibly submitted the unexecuted successor MLA to the Agency head because (1) bargaining over Article 18 was unresolved and (2) the Union had not signed the successor MLA.³⁵

Under § 7114(c), a negotiated agreement is subject to review by the head of the agency, but the agency head has only "[thirty] days from the date the agreement is executed" to approve or disapprove the agreement.³⁶ The date of execution that triggers the time limit for agency-head review under § 7114(c) is the date on which no further action is necessary to finalize a complete agreement.³⁷ Ordinarily, the date an agreement is executed is the date the parties sign it.³⁸ But this can change in the context of impasse proceedings. When the parties are at impasse and submit unresolved bargaining issues to the Panel, the agreement is executed on the date the Panel issues its order.³⁹ In contrast, where the parties continue substantive negotiations after the Panel issues its order, then the issuance of the Panel decision does not constitute the date the agreement was executed.⁴⁰

Here, the Panel resolved all of the ten remaining provisions of the successor MLA – including Article 18, Section 3(f) – in its order.⁴¹ And, as discussed above, the Arbitrator erred in finding that the Panel lacked the authority to impose Article 18, Section 3(f). Because the Arbitrator's conclusion that the Union properly withdrew from Article 18, Section 1(a) hinged on the erroneous conclusion that Article 18, Section 3(f) was unenforceable, there were no unresolved bargaining

issues after the Panel issued its order.⁴² Thus, the Agency was required to conduct Agency-head review within thirty days of the Panel's order because that was the date upon which no further action was required to finalize the successor MLA.⁴³

While the Union alleges in its opposition that Article 22, Section 3 was also unresolved at the time the Agency sought Agency-head review,⁴⁴ the Arbitrator did not mention Article 22, Section 3 in the award. The Arbitrator found that the only unresolved bargaining issues were Article 18, Sections 1(a) and 3(f).⁴⁵ Therefore, the Panel resolved all bargaining issues in its order,⁴⁶ and the Agency did not repudiate the 2005 MLA by submitting the successor MLA for Agency-head review within thirty days of the Panel's order.⁴⁷

Additionally, the Arbitrator concluded that the successor MLA was not properly executed because the Union did not sign the agreement before the Agency submitted it to the Agency head.⁴⁸ The Arbitrator reasoned that the ground rules permitted the Union to withhold its signature because there were unresolved bargaining issues.⁴⁹ But, as discussed above, the Arbitrator erred in concluding that there were unresolved bargaining issues after the Panel issued its order. And parties cannot unilaterally withdraw from Panel-imposed

³⁴ Exceptions Br. at 14-18.

³⁵ *Id.* at 16.

³⁶ 5 U.S.C. § 7114(c).

³⁷ *AFGE, AFL-CIO, Loc. 1815*, 69 FLRA 309, 319 (2016) (*Loc. 1815*) (citing *POPA*, 41 FLRA 795, 803 (1991) (*POPA*)).

³⁸ *Id.* (citing *Int'l Org. of Masters, Mates & Pilots*, 36 FLRA 555, 560 (1990)).

³⁹ *Id.* (citing *AFGE, Nat'l VA Council*, 39 FLRA 1055, 1057 (1991) (*Nat'l VA Council*) ("[T]he date on which the [Panel] decision was issued to, and served on, the parties constitutes the date on which the parties' agreement was executed, for purposes of agency[-]head review under [§] 7114(c) of the Statute.")).

⁴⁰ *Id.*; compare *NTEU*, 39 FLRA 848, 849 (1991) (finding the parties' agreement was not executed when the interest arbitration decision, directed by the Panel, was issued because the parties subsequently engaged in substantive negotiations), with *Nat'l VA Council*, 39 FLRA at 1057 (finding the parties' agreement was executed the date the Panel order issued because the parties did not engage in further negotiations).

⁴¹ Panel Order at *5.

⁴² Award at 15 (finding the Union was permitted to withdraw from Article 18, Section 1(a) under the ground rules because bargaining over Article 18 was incomplete); see *Nat'l VA Council*, 39 FLRA at 1057 (finding the parties' agreement was executed the date the Panel order issued because there were no unresolved bargaining issues and the parties did not engage in further negotiations).

⁴³ See *Loc. 1815*, 69 FLRA at 319 (citing *POPA*, 41 FLRA at 803).

⁴⁴ Opp'n Br. at 39.

⁴⁵ See Award at 15. To the extent that the Union now alleges that the Arbitrator erred by failing to address Article 22, that allegation constitutes an untimely exception, and we do not consider it. See *U.S. DHS, U.S. CBP, Dall., Tex.*, 64 FLRA 603, 605 n.4 (2010) (finding assertion made in opposition was an untimely exception); see also 5 C.F.R. § 2425.2(b) ("The time limit for filing an exception to an arbitration award is thirty (30) days after the date of service of the award.").

⁴⁶ See Panel Order at *1 (resolving the remaining ten issues at impasse).

⁴⁷ See 5 U.S.C. § 7114(c)(2) ("The head of the agency shall approve the agreement within [thirty] days from the date the agreement is executed . . ." (emphasis added)); *Loc. 1815*, 69 FLRA at 316 ("If the Panel decision represented the final act for the conclusion of the [parties' agreement], then the date that decision was issued also constituted its execution date . . ."); see also *Nat'l VA Council*, 39 FLRA at 1057.

⁴⁸ Award at 14.

⁴⁹ See *id.*

provisions merely by refusing to execute the agreement.⁵⁰ As a result, the Union could not withhold its signature to force the Agency to continue bargaining,⁵¹ and the successor MLA was executed when the Panel issued its order.⁵² Accordingly, the Arbitrator erred in finding that the Agency violated the Statute by submitting the successor MLA with the Panel-imposed provisions for Agency-head review.

Thus, we find the award contrary to § 7114.

Because, for the foregoing reasons, the award is contrary to both §§ 7119 and 7114 of the Statute, we set it aside.⁵³

IV. Decision

We set aside the award.

Chairman DuBester, concurring:

I agree with the Decision to set aside the award.

⁵⁰ See *Loc. 1815*, 69 FLRA at 320 (finding the union was obligated to execute the agreement once the Panel resolved the remaining unresolved bargaining issues); *AFGE, Loc. 2924, AFL-CIO (U.S. Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.)*, 25 FLRA 661, 672 (1987).

⁵¹ See *Loc. 1815*, 69 FLRA at 320 (finding the union could not withhold the execution of the parties' agreement by refusing to sign the agreement after the Panel resolved the remaining unresolved bargaining issues).

⁵² See *id.* at 316.

⁵³ Because we set aside the award, we need not address the Agency's remaining exceptions. See *U.S. DOL, Bureau of Lab. Stats.*, 66 FLRA 282, 284 n.5 (2011) (finding it was unnecessary to address the agency's remaining exceptions after setting aside the award as contrary to law).