72 FLRA No. 55

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 17
(Union)

0-AR-5575

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DECISION

May 21, 2021

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

I. Statement of the Case

The Agency enforced certain official-time limits that were set forth in an executive order, even though those limits conflicted with the parties' preexisting collective-bargaining agreement. Arbitrator William E. Persina found that, by enforcing the official-time limits, the Agency committed several unfair labor practices (ULPs), breached the parties' agreement, and violated a provision of the executive order itself. As relevant here, the Arbitrator directed the Agency to restore the official-time hours that the Agency had improperly denied the Union by enforcing the executive order.

The Agency argues in an exception that the award is contrary to the Federal Service Labor-Management Relations Statute (the Statute) because the Agency lawfully implemented the executive order "immediately" after its issuance.[1] Because the plain wording of § 7116(a)(7) of the Statute contradicts the Agency's argument, we deny the exception.

II. Background and Arbitrator's Award

In December 2017, the Agency requested renegotiations of the parties' collective-bargaining agreement, which was in a one-year rollover term.[2] Consistent with a requirement in the agreement, the parties commenced renegotiations within thirty days of the Agency's request. Renegotiations continued past March 2018 – the final month of the most recent rollover period for the agreement – and through the remainder of 2018 and all of 2019.

In May 2018, President Trump issued Executive Order No. 13,837 (the executive order).[3] Addressing official time under § 7131 of the Statute,[4] the executive order required agencies to: (1) "strive for a negotiated [official-]time rate of [one] hour or less" per bargaining-unit employee each fiscal year (the one-hour rate);[5] (2) with exceptions not relevant here, schedule employees to "spend at least three-quarters of their paid time . . . each fiscal year[] performing agency business" (the three-quarters mandate);[6] and (3) avoid implementing the executive order in a way that "abrogate[d] any collective[-]bargaining agreement in effect on the date of th[e] order."[7]

In July 2018, while renegotiations were ongoing, the Agency sent the Union memoranda stating that the Agency would immediately implement certain provisions of the executive order, including the one-hour rate and the three-quarters mandate. The memoranda also stated that the Agency had "terminated" provisions of the parties' agreement that conflicted with those executive-order provisions.[8] The Union filed a grievance alleging that the Agency's implementation of the executive order violated the parties' agreement, the Statute, and the executive order itself. The grievance proceeded to arbitration.

[1] Exceptions Br. at 11.

[2] A rollover agreement results from an automatic-renewal provision in a contract. If the parties take no action to amend or terminate the contract within a specified period before the original expiration date, then the automatic-renewal provision allows the contract to be extended for another term after its original expiration date. *Kan. Army Nat'l Guard, Topeka, Kan.*, 47 FLRA 937, 941 (1993).

[3] Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use, Exec. Order No. 13,837 (May 25, 2018), 83 Fed. Reg. 25,335 (June 1, 2018).

[4] 5 U.S.C. § 7131.

[5] Award at 4 (quoting Exec. Order No. 13,837, 93 Fed. Reg. at 25,336 (§ 3(a))).

[6] *Id.* (quoting Exec. Order No. 13,837, 93 Fed. Reg. at 25,337 (§ 4(a)(ii)(1))).

[7] *Id.* at 6 (quoting Exec. Order No. 13,837, 93 Fed. Reg. at 25,340 (§ 9(a))). After the Arbitrator issued his award, President Biden revoked Executive Order No. 13,837. Protecting the Federal Workforce, Exec. Order No. 14,003, 86 Fed. Reg. 7,231, 7,231 (Jan. 22, 2021) (revoking Executive Order No. 13,837 in § 3(b)).

[8] Award at 9.

Before the Arbitrator, the Union argued that the Agency's implementation of the executive order reduced the Union's official-time allotments, which were set forth in Article 48 of the parties' agreement. The Union also alleged that both Article 2 of the agreement and § 7116(a)(7) of the Statute prohibited the Agency from immediately implementing the executive order. Finally, the Union asserted that the Agency's violations of Articles 2 and 48 amounted to repudiations of the agreement, in violation of § 7116(a)(1) and (5) of the Statute,[9] as well as the provision of the executive order that prohibited agencies from relying on the order to abrogate an existing collective-bargaining agreement.

In contrast, the Agency urged the Arbitrator to find that the Agency was legally obligated to implement the executive order in July 2018. The Agency analogized its immediate implementation of the executive order to the circumstances in a decision where the Authority held that an agency could immediately suspend certain overtime payments because they were inconsistent with government-wide regulations.[10]

The Arbitrator framed three issues: (1) "Was the [a]greement in full force and effect under the 'Duration of Agreement' provision . . . during the relevant time period in this case?";[11] (2) If the answer to the first question is yes, did the Agency violate the agreement, the Statute, and the executive order when the Agency implemented the order in July 2018?; (3) If the answer to the second question is yes, "what should the remedy be?"[12]

Addressing the first issue, the Arbitrator noted that the "Duration of Agreement" provision in the parties' most recent rollover agreement contained a continuance clause, according to which, "[i]f renegotiation of an [a]greement is in progress but not completed upon the terminal date of this [a]greement, [then] this [a]greement will be automatically extended until a new agreement is negotiated."[13] He determined that the plain wording of that clause required him to find that, due to renegotiations that extended past the expiration date of the most recent rollover agreement, that agreement was "automatically extended until a new agreement [was] negotiated."[14] Further, the Arbitrator noted that the Agency's July 2018 memoranda supported his finding that the extended agreement was in effect at that time because the memoranda stated that the Agency was "terminat[ing]" contract provisions that the Agency viewed as inconsistent with the executive order.[15] Moreover, the Arbitrator found that the parties' renegotiations continued through the date of his award, which meant that the extended agreement remained "in effect at the time of the relevant events in this case."[16]

Next, the Arbitrator turned to the second issue, which concerned the Union's allegations that the Agency's enforcement of the executive order violated Article 2 and § 7116(a)(7) of the Statute, as well as Article 48's official-time provisions. Article 2 provided, in pertinent part, that the parties were governed by government-wide regulations in existence when the agreement was approved. Section 7116(a)(7) prohibits agencies from "enforc[ing] any rule or regulation . . . which is in conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed."[17] The Arbitrator found that the Agency violated both Article 2 and § 7116(a)(7) by enforcing the executive order while the extended agreement was in effect under the continuance clause. He noted that the extended agreement went into effect before the executive order issued, and the extended agreement remained in effect after the executive order issued. And because he found that the parties' conduct was governed by the extended agreement – and not any conflicting official-time provisions in the executive order – the Arbitrator found that the Agency's reductions to the Union's official-time allotments violated Article 48.

The Arbitrator held that the Agency's decision to terminate its compliance with Articles 2 and 48 had no "reasonable basis" in the executive order, the most recent rollover agreement, or the extended agreement.[18] He rejected the Agency's comparison to correcting illegal overtime payments. The Arbitrator noted that, in the overtime-payments decision, the controlling regulations existed *before* the parties' agreement went into effect, but, in the current dispute, the executive order issued *after* the extended agreement went into effect. Because the Agency acted based on unreasonable interpretations of the pertinent authorities, the Arbitrator concluded that the Agency committed "clear and patent" breaches of

[9] 5 U.S.C. § 7116(a)(1), (5).
[10] Exceptions, Attach., Ex. 2, Agency's Post-Hr'g Br. at 12 (citing *U.S. DHS, U.S. ICE*, 70 FLRA 628 (2018) (*DHS*) (then-Member DuBester dissenting), *pet. for review denied sub nom. AFGE, Nat'l Council, 118-ICE v. FLRA*, 926 F.3d 814, 819 (D.C. Cir. 2019)).
[11] Award at 2.
[12] *Id.* at 3.
[13] *Id.* (quoting Collective-Bargaining Agreement (CBA), Duration of Agreement, § 2).
[14] *Id.* at 14 (quoting CBA, Duration of Agreement, § 2).
[15] *Id.*
[16] *Id.*
[17] 5 U.S.C. § 7116(a)(7). Section 7116(a)(7) permits immediate enforcement of rules and regulations that implement a ban on prohibited personnel practices under 5 U.S.C. § 2302 – despite any conflicts between those rules and regulations and any applicable collective-bargaining agreement – but that caveat is not relevant here.
[18] Award at 15.

Articles 2 and 48, which he found went to the "heart" of the extended agreement.[19] Consequently, he held that the Agency committed ULPs by repudiating Articles 2 and 48, in violation of § 7116(a)(1) and (5) of the Statute.[20] And for the same reasons, the Arbitrator found that the Agency violated the executive order's prohibition on abrogating existing agreements.

Concerning the third issue – how to remedy the Agency's violations – the Arbitrator directed the Agency, as relevant here, to restore to the Union the official time that the Agency improperly withheld.

The Agency filed exceptions to the award on December 16, 2019, and the Union filed an opposition on January 15, 2020.

III. Analysis and Conclusion: The award is consistent with § 7116(a)(7) of the Statute.

The Agency argues that the executive order was a government-wide regulation that the Agency had the authority to implement immediately upon its issuance.[21] Because the award faulted the Agency's immediate implementation, the Agency argues that the award should be set aside as contrary to law.[22] However, the Agency's argument ignores § 7116(a)(7)'s clear prohibition on enforcing rules and regulations that "conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed."[23] The Arbitrator found that, under the plain wording of the continuance clause, the extended agreement was in effect before the President issued the executive order.[24] Thus, § 7116(a)(7) prohibited immediate enforcement of the executive order where it conflicted with provisions of the extended agreement.

The Agency notes that the President issued the executive order in accordance with his authority to regulate the civil service under 5 U.S.C. § 7301.[25] The Authority has recognized in negotiability disputes that executive orders issued pursuant to statutory authority "are to be accorded the force and effect" of a "law" enacted by Congress.[26] However, recognizing that an executive order has the force and effect of law does not mean that the executive order is beyond the reach of § 7116(a)(7)'s enforcement bar. Indeed, the Authority has recognized that several types of regulations are accorded the force and effect of law, but they remain *regulations* that are subject to § 7116(a)(7)'s enforcement

[19] *Id.* at 18.

[20] 5 U.S.C. § 7116(a)(1), (5).

[21] Exceptions Br. at 11-12. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

[22] Exceptions Br. at 12.

[23] 5 U.S.C. § 7116(a)(7); *see USDA, Off. of the Gen. Couns.*, 71 FLRA 986, 987 & n.13 (2020) (*USDA*) (then-Member DuBester dissenting) (recognizing that Executive Order No. 13,837 was a government-wide regulatory action subject to the enforcement limitations set forth in § 7116(a)(7)).

[24] The Agency asserts, for the first time on exceptions, that the agreement permanently expired at the end of the most recent one-year rollover. Exceptions Br. at 12-14, 17-19. Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5. The Union asserted before the Arbitrator that, due to the continuance clause, the parties' agreement "was in effect" during all relevant times, Exceptions, Attach., Ex. 3, Union's Post-Hr'g Br. at 9, and the Agency did not dispute that assertion at arbitration. Because the Regulations bar considering the Agency's argument on exceptions that the agreement permanently expired before the executive order issued, we dismiss it. *SSA*, 71 FLRA 798, 802 n.47 (2020) (then-Member DuBester dissenting, in part, on other grounds; Member Abbott dissenting, in part, on other grounds) (finding §§ 2425.4(c) and 2429.5 barred arguments not presented below). The Regulations also bar the Agency's contention that continuance clauses are contrary to public policy, Exceptions Br. at 14, because the Agency failed to raise that argument at arbitration, so we dismiss the Agency's public-policy exception. *But see generally USDA*, 71 FLRA 986 (addressing the interplay between continuance clauses and § 7116(a)(7)).

[25] Exceptions Br. at 11. Under 5 U.S.C. § 7301, "The President may prescribe regulations for the conduct of employees in the executive branch." The Agency asserts that the President has the authority, under § 7301, to "override existing regulations," Exceptions Br. at 11, but this case has nothing to do with the President's authority to override regulations. Therefore, we do not address this assertion further.

[26] *POPA*, 71 FLRA 1223, 1224 (2020) (then-Member DuBester dissenting) (citing *NFFE, Loc. 15*, 30 FLRA 1046, 1070 (1988)).

bar, rather than *statutes* that are beyond the reach of § 7116(a)(7).[27]

Moreover, the Authority recently recognized that the executive order at issue in this case is a government-wide regulatory action that is subject to § 7116(a)(7)'s enforcement bar.[28] And that holding was consistent with guidance from the Office of Personnel Management (OPM) on implementing the executive order. In particular, OPM advised agencies to treat the executive order as a regulation for purposes of § 7116(a)(7): "[A]ll relevant provisions of the [executive order] become operative and enforceable *at the conclusion of a current term* of a [collective-bargaining agreement]."[29] Thus, neither the Authority's recent precedent on § 7116(a)(7), nor OPM's guidance on implementing the executive order, supports treating the executive order like a statute, rather than a regulation subject to § 7116(a)(7)'s enforcement bar.

Next, the Agency argues that § 7116(a)(7) did not apply in this case because the Authority has held that § 7116(a)(7)'s prohibition on enforcing newly issued regulations applies "for the express term of the agreement during which the [g]overnment-wide regulation was first prescribed, but no longer."[30] But the award is consistent with the Authority's previous applications of § 7116(a)(7) because, when the President issued the executive order, the parties were in the midst of an "express term" of their agreement – that is, the term coinciding with their ongoing renegotiations – and that term will run "until a new agreement is negotiated."[31] We reject the Agency's argument to the contrary.

[27] 5 U.S.C. § 7116(a)(7) (addressing "any rule or regulation," but not statutes). For example, the Authority has found that both an internal agency regulation and Office of Management and Budget (OMB) Circular A-76 had the "force and effect of law." *U.S. DOJ, Exec. Off. for Immigr. Rev., Bd. of Immigr. Appeals*, 65 FLRA 657, 662 (2011) (Member Beck concurring) (internal agency regulation had force and effect of law); *NTEU*, 47 FLRA 304, 306 (1993) (OMB Circular A-76 had "force and effect of law"); *see also NTEU*, 42 FLRA 377, 390-91 (1991) (*NTEU 1991*) (explaining that "applicable laws" under § 7106(a)(2) include rules and regulations having the force and effect of law)*, enforcement denied on other grounds sub nom. U.S. Dep't of the Treasury, IRS v. FLRA*, 996 F.2d 1246 (D.C. Cir. 1993); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 55 FLRA 687, 690 (1999) (applying *NTEU 1991* to find that internal agency regulation had force and effect of law). Nevertheless, regulations that have the force and effect of law are still not statutes, and the same is true for executive orders that have the force and effect of law. *See, e.g.*, *U.S. DOD, Ill. Nat'l Guard, Scott Air Force Base, Ill.*, 69 FLRA 345, 347 (2016) (distinguishing between statutes and "regulations having the force and effect of law"); *cf. Fed. Pro. Nurses Ass'n, Loc. 2707*, 43 FLRA 385, 390 (1991) (identifying "lawfully enacted statutes" and "certain [p]residential executive orders issued pursuant to express statutory authorization" as distinct categories of legal authorities).

[28] *USDA*, 71 FLRA at 987 & n.13.

[29] U.S. Off. of Pers. Mgmt., Updated Guidance on Implementation of Executive Orders 13836, 13837, and 13839 (Nov. 25, 2019) (citing *U.S. Dep't of Com., Patent & Trademark Off.*, 65 FLRA 817 (2011)), https://chcoc.gov/content/updated-guidance-implementation-executive-orders-13836-13837-and-13839 [https://web.archive.org/web/20201111225708/https://chcoc.gov/content/updated-guidance-implementation-executive-orders-13836-13837-and-13839]. Like the executive order itself, OPM's guidance was later rescinded. U.S. Off. of Pers. Mgmt., Guidance for Implementation of Executive Order 14003 - Protecting the Federal Workforce, Attach. 2, at 3 (Mar. 5, 2021), https://www.chcoc.gov/content/guidance-implementation-executive-order-14003-protecting-federal-workforce [https://web.archive.org/web/20210310131942/https://www.chcoc.gov/content/guidance-implementation-executive-order-14003-protecting-federal-workforce] (identifying November 25 guidance as rescinded).

[30] Exceptions Br. at 16 (emphasis omitted) (quoting *U.S. Dep't of the Army, Headquarters III Corps & Fort Hood, Fort Hood, Tex.*, 40 FLRA 636, 641 (1991)).

[31] Award at 3 (quoting CBA, Duration of Agreement, § 2). The Authority recently clarified that, where a continuance clause extends a collective-bargaining agreement for an additional term that coincides with the parties' renegotiations, any government-wide regulations that were prescribed *before* the continuance clause took effect (to extend the agreement) would govern the parties immediately, by operation of law, on the first day of the continuance-clause extension. *USDA*, 71 FLRA at 989. But that holding does not govern this dispute because the executive order issued *after* the continuance clause extended the agreement between the Union and the Agency. *NTEU*, 14 FLRA 243, 245 (1984) ("[B]ased upon [§§] 7116(a)(7) and 7117(a)(1)[,] . . . *once a collective*[-]*bargaining agreement becomes effective*, subsequently issued rules or regulations . . . cannot nullify the terms of such a collective[-]bargaining agreement." (emphasis added) (footnote omitted)).

Separately, the Agency asserts that it did not repudiate the agreement in violation of the Statute, or abrogate the agreement in violation of the executive order, because "management cannot be bound by a [contract] provision that conflicts with law."[32] However, the Agency relies on a decision in which the Authority found that an agency need not abide by a contract provision that conflicted with *statutory law*.[33] As already explained, unlike rules and regulations, statutes are not subject to § 7116(a)(7)'s enforcement prohibition. But the executive order is not a statute, and § 7116(a)(7) prohibits the enforcement of any rules or regulations, including executive orders, that conflict with preexisting collective-bargaining agreements.[34]

Finally, the Agency repeats the argument that it presented to the Arbitrator about how the Agency's actions in this case were supposedly analogous to an agency immediately suspending overtime payments that government-wide regulations prohibited.[35] However, the Arbitrator correctly explained that the overtime-payments case differed from the instant dispute because the controlling regulations in the overtime-payments case existed *before* the agreement between those parties went into effect.[36] Here, the executive order was issued *after* the extended agreement went into effect, and, consistent with § 7116(a)(7), the extended agreement controlled for the remainder of its express term. Thus, we reject this argument on the same basis as the Arbitrator.[37]

Based on the reasons above, we deny the Agency's contrary-to-law exception.[38]

IV. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

Chairman DuBester notes that he continues to believe that *USDA* was wrongly decided. *See USDA*, 71 FLRA at 990-91 (Dissenting Opinion of then-Member DuBester). However, he agrees that *USDA* does not govern this dispute.

[32] Exceptions Br. at 17 (citing *GSA, Wash., D.C.*, 50 FLRA 136, 138 (1995) (*GSA*)).

[33] *GSA*, 50 FLRA at 138 (finding agency did not violate the Statute by refusing to honor a contract provision in conflict with the Federal Employees Flexible and Compressed Work Schedules Act of 1982).

[34] As stated in note 17 above, this case does not implicate the exception to § 7116(a)(7)'s enforcement bar for rules and regulations that implement a ban on prohibited personnel practices.

[35] Exceptions Br. at 18 (citing *DHS*, 70 FLRA at 630).

[36] Award at 16-17.

[37] Although the Agency's contrary-to-law exception also includes a challenge to the Arbitrator's remedy directing the restoration of official time to the Union, the premise of this remedial challenge is that the parties' agreement was not extended but, instead, permanently expired. Exceptions Br. at 19 ("Article 48 . . . [was] no longer in effect, . . . and therefore, cannot provide a remedy above [the executive order's limits]."). For the reasons set forth in note 24 above, the Authority's Regulations bar consideration of the Agency's expiration argument. Thus, the Regulations also bar the Agency's remedial challenge because it depends entirely on the expiration argument. We dismiss the remedial challenge accordingly.

[38] In a section heading of its brief, the Agency states that the award is "based on an error of law and *fails to draw from the essence of the contract*." Exceptions Br. at 10 (emphasis added). However, the Agency does not provide any arguments to support an essence exception. Therefore, we deny the essence exception as unsupported. 5 C.F.R. § 2425.6(e)(1) ("An exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground [for review] . . . .").

Member Abbott, concurring:

I agree with my colleagues that this case turns on the fact that the parties' agreement was in effect when Executive Order (EO) 13,837—a government-wide regulation—was issued.[1] As such, § 7116(a)(7) prohibited the immediate enforcement of the EO to the extent it conflicted with provisions of the parties' extended agreement.[2]

In my continuing quest to provide clarity to Authority decisions, I write separately to explain why our decision today is consistent with *USDA, Office of the General Counsel* (*USDA*).[3]

In *USDA*, the Authority held that an automatically extended agreement must comply with "all government-wide regulations that became effective during the *previous* term of the agreement . . . ."[4] The Authority further held that when such an extension occurs, "*the first day of the extension period* . . . marks *the beginning of a new term* for the agreement . . . ."[5] Here, the parties' agreement contained a provision that automatically extended the agreement until the parties negotiated a new agreement.[6] Pursuant to that provision, the parties' agreement entered a new term on *March 16, 2018*.[7] The EO was issued on *May 25, 2018*.[8] Therefore, the EO was issued *after* the agreement entered the new term. As such, *USDA* does not allow the Agency to implement the EO during the current, extended term of the parties' agreement.

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[1] Majority at 5-7.

[2] *See* 5 U.S.C. § 7116(a)(7) ("[I]t shall be an unfair[-]labor[-]practice for an agency to enforce any rule or regulation . . . which is in conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed.").

[3] 71 FLRA 986 (2020) (then-Member DuBester dissenting).

[4] *Id.* at 989 (emphasis added).

[5] *Id.* (emphasis added).

[6] Award at 3 ("This [a]greement shall remain in full force and effect for a period of three years after its effective date. It shall be automatically renewed for one[-]year periods unless either party give the other party notice of its intention to renegotiate this [a]greement . . . . If renegotiation of an [a]greement is in progress but not completed upon the terminal date of this [a]greement, this [a]greement will be automatically extended until a new agreement is negotiated." (quoting the duration clause of the parties' agreement)).

[7] *Id.* at 14 ("The [a]greement was executed on March 15, 2011, and the Agency requested to renegotiate the [a]greement in December 2017.").

[8] *See Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, Exec. Order No. 13,837 (May 25, 2018), 83 Fed. Reg. 25,335 (June 1, 2018).