73 FLRA No. 64

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 169
(Union)

0-AR-5633

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DECISION

October 25, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members

I. Statement of the Case

The Union filed a grievance alleging that the Agency was required to bargain over then-President Trump's executive orders (EOs) 13,836, 13,837, and 13,839[1] before the Agency could implement those EOs. Arbitrator Perry A. Zirkel issued an award finding that the Agency had to meet certain bargaining obligations before implementing two of the EOs.

The Agency filed exceptions to the award. While the exceptions were pending before the Authority, President Biden issued EO 14,003, which revoked the three above-referenced EOs.[2] For the reasons discussed below, we find that the parties' underlying dispute is now moot, and we vacate the award.

II. Background

After the parties' collective-bargaining agreement expired, the Agency notified the Union that it was implementing EOs 13,836, 13,837, and 13,839. The Union filed a grievance alleging that the Agency was required to bargain over the EOs' substance and "(not just over procedures and appropriate arrangements)" before implementing them.[3] The grievance went to arbitration.

In an April 17, 2020 award, the Arbitrator framed the issues as: "Whether, prior to implementing [the] EOs . . . , the Agency was required to bargain over both (a) the substance and (b) the procedures and appropriate arrangements of the EOs? If so, what shall the remedy be?"[4]

The Arbitrator found that the Agency is not required to bargain over the EOs' substance, but "*is* required to bargain the procedures and appropriate arrangements of EOs 13[,]837 or 13[,]839 . . . if the Union's respectively responding proposals meet the applicable standards of the [Federal Labor Relations Authority (FLRA)]."[5] Regarding the latter issue, the Arbitrator stated that, "[i]n the absence of a sufficient record for a more definitive ruling,"[6] the Arbitrator could "do no more than decide that if the Union's proposals in response to EOs 13[,]837 or 13[,]839 qualify under the applicable FLRA[] standards for procedures and appropriate arrangements, the Agency must subject them to [impact-and-implementation] bargaining prior to enforcing the respectively qualifying EO."[7]

The Agency filed exceptions to the award on May 15, 2020, and the Union filed an opposition to the exceptions on June 4, 2020.

III. Order to Show Cause

On January 22, 2021, while the exceptions were pending before the Authority, President Biden issued EO 14,003, which revoked EOs 13,836, 13,837, and 13,839.[8] Then, on January 26, 2022, the Authority's Office of Case Intake and Publication (CIP) issued an order (January order) directing the Agency to show cause why its exceptions should not be dismissed "because EOs 13,837 and 13,839 are no longer in effect, and the

[1] *See* EO 13,836, Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining, 83 Fed. Reg. 25,329 (May 25, 2018); EO 13,837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use, 83 Fed. Reg. 25,335 (May 25, 2018); EO 13,839, Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles, 83 Fed. Reg. 25,343 (May 25, 2018).

[2] *See* EO 14,003, Protecting the Federal Workforce, 86 Fed. Reg. 7,231, 7,231 (Jan. 22, 2021).

[3] Award at 3.

[4] *Id.* at 5.

[5] *Id.* at 11 (emphasis added).

[6] *Id.* at 10.

[7] *Id.*

[8] *See* EO 14,003.

award and exceptions are based on the Arbitrator ordering the Agency to bargain over those EOs."[9]

On February 8, 2022, the Agency filed a response to the January order, contending that the rescission of EOs 13,837, and 13,839 "has rendered the underlying dispute moot" – but that, "in addition to dismissing the Agency's exceptions," the Authority also should set aside the award.[10]

Based on that response, CIP issued a second order on August 22, 2022 (August order). The order asked the Union to provide additional information so that the Authority could determine "whether the parties' underlying dispute is moot, such that it would be appropriate to dismiss the Agency's exceptions, set aside the underlying arbitration award, or both."[11]

On August 31, 2022, the Union filed a response to the August order. The Union argues that the Authority should not set aside the Arbitrator's award as moot, because the Agency's response to the January order: "makes no mention of how [the Agency] can guarantee that the violation of rights that occurred from the implementation of an [EO] without first bargaining [i]mpact and [i]mplementation is unlikely to occur again"; offers no evidence that the Agency "ameliorated the negative effects of its illegal implementation"; and "shows that [the Agency] intends to repeat the same behavior absent a specific legal finding that their legal interpretation is flawed."[12]

IV. Analysis and Conclusion: We set aside the award because the underlying dispute is moot.

The Authority previously has found it appropriate to set aside an arbitration award where the parties' underlying dispute was moot.[13] An underlying dispute becomes moot when the parties no longer have a legally cognizable interest in the dispute.[14] When a party argues that a matter is moot, it must demonstrate: (1) that there is no reasonable expectation that the alleged violation will recur; and (2) events have completely or irrevocably eradicated the effects of the alleged violation.[15]

As to the first prong of the mootness test, the only issue before the Arbitrator was whether the Agency has a pre-implementation duty to bargain over EOs 13,836, 13,837, and 13,839. The Arbitrator found no substantive bargaining obligation, but determined that the Agency has a pre-implementation duty to bargain over procedures and appropriate arrangements concerning EOs 13,837 and 13,839. In other words, the Arbitrator's findings regarding the Agency's bargaining obligations were expressly tied, and limited, to EOs 13,836, 13,837, and 13,839 – not broadly to the types of matters that those EOs addressed. However, President Biden revoked those three EOs. Therefore, the Agency cannot subsequently attempt to implement them. For these reasons, there is no reasonable expectation that the alleged violation will recur.[16]

Regarding the second prong, the Arbitrator did not find that the Agency actually made any changes to implement the now-revoked EOs. Further, although the Authority asked the Union to explain why the underlying dispute is not moot, the Union merely asserts, broadly, that the Agency has not shown that it "ameliorated the negative effects of its illegal implementation."[17] The Union does not explain what those alleged negative effects are; it does not assert that the Agency actually made any changes, let alone explain what they were. For these reasons, there is no basis in the record for finding that setting aside the award would leave anything unremedied. In other words, the revocation of the three EOs has eradicated the award's effects, and the parties no longer have a legally cognizable interest in the dispute.

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[9] Jan. Order at 3.
[10] Agency's Resp. to Jan. Order at 4.
[11] Aug. Order at 1.
[12] Union's Resp. to Aug. Order at 2.
[13] *U.S. DHS, CBP, U.S. Border Patrol, Laredo Sector*, 70 FLRA 921, 922 (2018) (*Laredo*) (then-Member DuBester concurring) (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 60 FLRA 966, 967 (2005) (*IRS*)).
[14] *Id.* (citing *IAMAW Dist. Lodge 776*, 63 FLRA 93, 94 (2009)).
[15] *Id.* (citing *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 59 FLRA 378, 380 (2003)).
[16] We note that the mere possibility that similar executive orders could be implemented in the future is insufficient to evade a finding of mootness. *See, e.g.*, *Reale v. Lamont*, No. 20-3707-CV, 2022 WL 175489, at *1 (2d Cir. Jan. 20, 2022) (finding dispute moot where it involved a challenge to state executive orders that had been repealed); *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 10 (1st Cir. 2021) ("That the [g]overnor has the power to issue executive orders cannot itself be enough to skirt mootness, because then no suit against the government would ever be moot."); *Nat'l Black Police Ass'n v. D.C.*, 108 F.3d 346, 349 (D.C. Cir. 1997) ("[T]he mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists."). We similarly reject the Union's argument that the underlying dispute is not moot because it is "quite likely . . . the Agency would repeat its legal mistakes the next time it plans to implement an Executive Order." Union's Resp. to Aug. Order at 2. *See, e.g.*, *Redfern v. Napolitano*, 727 F.3d 77, 85 (1st Cir. 2013) ("Pure speculation as to future injury is not sufficient to meet the exception to mootness" (quoting *Protestant Mem'l Ctr., Inc. v. Maram*, 471 F.3d 724, 732 (7th Cir. 2006))).
[17] Union's Resp. to Aug. Order at 2.

Accordingly, we conclude that the underlying dispute is moot, and we vacate the award.[18]

V. Decision

We vacate the award.

[18] *See Laredo*, 70 FLRA at 922 (setting aside award where the issue in the grievance was fully resolved and the parties had no cognizable legal interest in the dispute); *IRS*, 60 FLRA at 967 (setting aside award where the issue in the grievance was fully resolved and no cognizable legal interest remained in the dispute).