

90 FLRR 1-1550

**Department of Justice and Immigration  
and Naturalization Service and AFGE,  
National Border Patrol Council**

**Federal Labor Relations Authority**

3-CA-90347; 37 FLRA No. 111; 37 FLRA  
1346

**October 30, 1990**

**Judge / Administrative Officer**

**Before: McKee, Chairman, Talkin and  
Armendariz, Members**

Denied at 90 FLRR 1-1637 Dismissed without  
opinion (D.C. Cir. 11/06/91)

**Related Index Numbers**

**1.261 Federal Labor Relations Administrative  
Authorities, Authority and Duties, Determination  
of Negotiability, Federal Labor Relations  
Authority**

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Laws and Programs, Privacy Act**

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**46.52 Collective Bargaining Agreement,  
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**47.862 Grievances/Grievance Arbitration,  
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**Miscellaneous Unfair Labor Practices, Refusal to  
Supply Information, Sanitization**

**Case Summary**

THE FLRA REVERSES ITS POSITION ON AGENCY HEAD REVIEW OF PANEL-DIRECTED INTEREST ARBITRATION AWARDS. BLANKET DISCLOSURE OF INFORMATION CONCERNING DISCIPLINARY ACTIONS AGAINST EMPLOYEES NOT SEEKING UNION REPRESENTATION WAS CONTRARY TO THE PRIVACY ACT. (1) In the wake of recent decisions by the Fourth, Fifth, and Ninth Circuits, the FLRA abandoned its position that interest arbitration awards resulting from Panel action under 5 USC 7119(b)(1) were not reviewable by the agency head pursuant to 5 USC 7114(c) and that such awards were appealable under the same procedure as grievance arbitration awards, 5 USC 7122. The Authority now held that interest arbitration awards issued pursuant to Panel direction under Section 7119(b)(1) were reviewable by the agency head. Provisions disapproved by the agency head could form the basis of either a negotiability appeal or an unfair labor practice charge. Interest arbitration awards resulting from voluntary action by the parties under 5 USC 7119(b)(2) would be treated in the same way as grievance arbitration awards, i.e., no agency head review and appeal to the FLRA pursuant to 5 USC 7122. (2) The General Counsel charged that the agency head violated 5 USC 7116(a)(1) and (8) by disapproving a renegotiated contract clause which was not materially different from a provision declared negotiable in *NTEU*, 32 FLRA 62. The Authority disagreed. The challenged provision required the employer to supply the union with unsanitized copies of notices of proposed disciplinary and adverse actions, final actions taken, and decisions on subsequent appeals in cases where the affected employee has not sought union representation. The Authority concluded that the provision violated the Privacy Act, 5 USC 552a and FOIA, 5 USC 552(b)(6). The provision sought the blanket disclosure of stigmatizing information without the consent of the employee involved. The

Authority pointed out that one reason for an employee not seeking union representation might be a desire to maintain privacy. In this case, the employee's right of privacy outweighed the union's interest in receiving unsanitized information relating to disciplinary actions without expressing a particularized need for the information. The Authority distinguished *NTEU*, in part, and stated that the case would not be followed to the extent that it implied that the union would always have a right to information on disciplinary actions in the bargaining unit. The ULP complaint was dismissed.

## Full Text

### DECISION AND ORDER

#### I. Statement of the Case

This unfair labor practice case is before the Authority in accordance with section 2429.1 of the Authority's Rules and Regulations, based on the parties' stipulation of facts. The Respondents, U.S. Department of Justice (Respondent Justice) and U.S. Immigration and Naturalization Service (Respondent INS), the Union and the General Counsel filed briefs with the Authority.

The complaint alleges that: Respondent INS violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to implement provisions of a collective bargaining agreement; Respondent Justice violated sections 7116(a)(1) and (5) of the Statute by interfering with the bargaining relationship between Respondent INS and the Union; and Respondent Justice violated sections 7116(a)(1) and (8) of the Statute by disapproving a provision negotiated by Respondent INS and the Union.

In addition to the issues raised in the complaint, this case raises the following issues: (1) the authority of the Federal Service Impasses Panel (the Panel) to order interest arbitration to resolve a negotiation impasse; (2) the authority of an agency head, under section 7114(c) of the Statute, to review provisions directed to be included in a collective bargaining agreement as a result of interest arbitration; and (3)

the mechanism for challenging provisions imposed through interest arbitration.

Resolution of the issues presented requires the Authority to reexamine existing case law in light of recent court litigation on related matters. As explained more fully below, we conclude that agency heads are authorized to review provisions directed to be included in an agreement as a result of interest arbitration directed by the Panel under section 7119(b)(1) of the Statute. Based on this result, we conclude that no unfair labor practices were committed and we will dismiss the complaint.

#### II. Background

The parties to this case and certain of the issues in dispute have been the subject of the following prior decisions by the Authority: United States Department of Justice, Immigration and Naturalization Service and American Federation of Government Employees, National Border Patrol Council, 31 FLRA 1123 (1988) (Immigration and Naturalization Service)\*1 and American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, 31 FLRA 1193 (1988) (Department of Justice).

The basic issues in dispute, here and in the earlier proceedings, arise out of the parties' negotiations over a collective bargaining agreement to replace the prior agreement that had been negotiated in 1976. During the course of negotiations, which commenced sometime in 1984 or 1985, the parties reached impasse. The Union requested Panel assistance pursuant to section 7119 of the Statute. On March 12, 1986, the Panel directed the parties to submit the issues in dispute to an arbitrator of their choice. Joint Exhibit 4. See also Immigration and Naturalization Service, 31 FLRA at 1125 and Department of Justice, 31 FLRA at 1195. The arbitrator ultimately decided to use a "mediation/arbitration" process to resolve the issues in dispute.

Mediation sessions were held at various times in 1986, during which agreement was reached on a

number of disputed contract articles. Joint Exhibit 4. The interest arbitration phase of the process commenced on April 27, 1987, to resolve the remaining issues. Id.

On September 25, 1987, the arbitrator issued an opinion and award in which he directed the parties to adopt, as their entire agreement, the provisions that had been voluntarily negotiated by the Union and Respondent INS along with the provisions that had been either mediated or arbitrated. Stipulation of Facts at 3, para. 8. On October 23, 1987, Respondent Justice disapproved various provisions of the agreement. The Union appealed the disapproval to the Authority (Case No. 0-NG-1480). Additionally, the Union and the Respondents filed exceptions to the arbitrator's award with the Authority.

The Authority dismissed the Union's petition for review in Case No. 0-NG-1480 in Department of Justice. The Authority relied on its decision in Department of Defense Dependents Schools (Alexandria, Virginia), 27 FLRA 586 (1987), which was later reversed and remanded in Department of Defense Dependents Schools v. FLRA, 852 F.2d 779 (4th Cir. 1988) (DODDS), for the conclusion that the Agency head was not empowered to review provisions that were directed to be included in the collective bargaining agreement as a result of interest arbitration. Consequently, the Authority concluded that, as the agency head's disapproval did not serve as an allegation of nonnegotiability, there was no basis on which the Union could file a petition for review.

The Authority resolved the parties' exceptions to the arbitrator's award in Immigration and Naturalization Service. The Authority found several of the provisions to be deficient. Specifically, the disputed portion of Article 31, Section B was found to conflict with section 7114 of the Statute and was struck from the award. Additionally, Article 32, Sections A, B and F.5 were found deficient on the basis that they raised questions involving the duty to bargain which the arbitrator was not authorized to resolve. In striking the provisions of Article 32 from the award, the Authority ordered the parties to resume

bargaining, consistent with Authority case law, over those provisions.

Following issuance of the Authority's decisions, the Union requested bargaining over a new Article 32 and also requested immediate implementation of all other provisions of the agreement. After 2 months elapsed and following the Union's repeated requests to implement the award and bargain over the revised Article 32, the Union again sought the services of the Panel. The Union requested that: (1) the collective bargaining agreement be implemented immediately, and the provisions of Article 32 which were directed to be renegotiated be held in abeyance; and (2) Respondent INS negotiate over the revised Article 32 which had been presented to it. The Panel declined to assert jurisdiction over the Union's request on the basis that there existed duty to bargain issues which would have to be resolved in order to determine whether the parties had reached a negotiation impasse.

The Union subsequently filed an unfair labor practice charge in Case No. 3-CA-80613 alleging a violation of sections 7116(a)(1), (5), (6) and (8) of the Statute based on the Respondents' refusal to implement the arbitration award or to bargain concerning partial implementation, refusal to bargain over the provisions of Article 32, and unlawful implementation of the portion of the award concerning a uniform voucher system. The Union withdrew this charge at the request of the General Counsel in order "to refile once Article 32 had been renegotiated in accordance with 31 FLRA 1123." Stipulation of Facts at 5, para. 13.

On or about January 6, 1989, Respondent INS and the Union reached agreement on a revised Article 32. On January 13, 1989, Respondent Justice disapproved ten provisions of the Article. On February 10, 1989, and July 18, 1989, Respondent Justice withdrew all allegations of nonnegotiability except for Section B of Article 32.\*2

The record indicates that the parties have not agreed to implement any provisions of the agreement and that none have been implemented.

### III. Positions of the Parties

#### A. The Respondents

The Respondents filed a brief containing numerous arguments and incorporating submissions previously made to the Authority. The Respondents' arguments are summarized here and will be addressed in greater detail, as appropriate, in the "Analysis and Conclusions" portion of this decision.

The Respondents argue that: (1) the unfair labor practice charge was not timely filed; (2) Immigration and Naturalization Service and Department of Justice were incorrectly decided; (3) Article 32, Section B is outside the duty to bargain; and (4) the agency head could properly review the renegotiated Article 32, Section B.

As to its first argument, that the charge was not timely filed, the Respondents state that this issue must be addressed only if the Authority finds that a valid interest arbitration award was issued and the Authority had jurisdiction to resolve the exceptions. If that is the case, then the Respondents argue that the charge was filed more than 6 months from the date the award became final and binding: April 13, 1988, the date of issuance of Immigration and Naturalization Service. Respondent's Brief at 19-20.

Next, the Respondents argue that Immigration and Naturalization Service and Department of Justice were incorrectly decided by the Authority. *Id.* at 32. The Respondents maintain that the Panel did not have the authority under section 7119(b)(1) of the Statute to order the parties to submit their impasse to an outside arbitrator and, consequently, the arbitrator had no jurisdiction to resolve the impasse. *Id.* at 33, 35. The Respondents also argue that section 7119(c)(5)(B)(iii) of the Statute does not authorize the Panel to require the parties to submit their impasse to an outside arbitrator, and that the Panel cannot decline to exercise its own jurisdiction under section 7119(b)(1) by directing the parties to an outside interest arbitrator. *Id.* at 41, 46. The Respondents further argue, in this latter regard, that the Panel is "subverting Congress's budget determinations" by

requiring the parties to spend their own funds to pay for an outside arbitrator when it is the Panel that has been authorized by Congress to resolve impasses. *Id.* at 48.

The Respondents argue, alternatively, that if the Panel had the jurisdiction to order outside arbitration, then the Arbitrator could only assert jurisdiction over the issues that were at impasse. *Id.* at 49. The Respondents claim that the portions of the agreement to which the parties had voluntarily agreed (three provisions), or which had been resolved by the Arbitrator during the mediation phase of the mediation/arbitration process (one provision), were not at impasse during the arbitration phase of the proceeding and, therefore, were not matters over which the Arbitrator had jurisdiction. Instead, the Respondents argue that the Authority should have considered those four provisions, which had been declared nonnegotiable by the agency head, in Department of Justice, rather than dismissing the petition for review. *Id.* at 50-51.

The Respondents further argue, assuming the Panel had the authority to direct the parties to outside arbitration, that there are three reasons why the Authority did not have jurisdiction to resolve the exceptions under section 7122: (1) a declaration of nonnegotiability must be resolved in the same manner when a provision is imposed by an outside arbitrator as when the Panel itself imposes provisions; (2) interest arbitration awards are different from grievance arbitration awards in that interest arbitration awards are susceptible to declarations of nonnegotiability which may be challenged through the negotiability or unfair labor practice procedures of the Statute; and (3) agency heads are required to review arbitrator-imposed language under section 7114(c) of the Statute. *Id.* at 53-54.

Next, the Respondents argue that Article 32, Section B is nonnegotiable, principally because the provision would allow the release of information without employee consent. *Id.* at 82-83. The Respondents rely on the Privacy Act, 5 U.S.C. 552a, and Federal and private sector case law to support

their position that the information may not be released. The Respondents also argue that the Authority's decision in National Treasury Employees Union, Chapter 237 and U.S. Department of Agriculture, Food and Nutrition Service, Midwest Region, 32 FLRA 62, 67-72 (1988) (National Treasury Employees Union), in which provisions essentially the same as Article 32, Section B, were found to be negotiable, is inconsistent with United States Department of Justice v. Reporters Committee For Freedom Of the Press, 489 U.S. 749 (1989) and the Privacy Act. *Id.* at 84-85. The Respondents argue that the provision here is similarly inconsistent with the Privacy Act.

Finally, the Respondents claim that if the General Counsel argues that the agency head had no authority to review the renegotiated Article 32, Section B, the Authority should not consider the argument. The Respondents indicate that the General Counsel's position in the complaint is based on the disapproval of the provision being improper, and not on review of the provision. Consequently, the Respondents argue that "[t]he General Counsel cannot now take the position that the agency head had no authority to even review Article 32 as renegotiated on January 6, 1989." *Id.* at 103.

#### B. The General Counsel

According to the General Counsel, Respondent INS' arguments that the Panel lacked authority to direct the parties to binding arbitration, and that section 7114(c) authorizes review of provisions directed to be included in an agreement as a result of an interest arbitration award, were addressed and rejected in Immigration and Naturalization Service. General Counsel's Brief at 7-8. The General Counsel notes that, in the Authority's Decision and Order on Remand in Department of Defense Dependents Schools (Alexandria, Virginia), 33 FLRA 659 (1988) (DODDS Alexandria), the Authority adopted the court's decision in DODDS, 852 F.2d 779, as the "law of the case" applicable only to situations in which the Panel directs arbitration and designates one of its members to serve as the interest arbitrator. *Id.* at 8.

The General Counsel concludes that the Respondent's arguments here lack merit and that Respondent INS' failure and refusal to implement the parties' agreement constitutes a failure and refusal to bargain in good faith.

As to the allegation of the complaint regarding Respondent Justice, the General Counsel argues that Respondent Justice's disapproval of the renegotiated Article 32, Section B, was improper because the provision is not contrary to law and is not materially different from provisions previously found negotiable in National Treasury Employees Union. *Id.* at 10-11. Consequently, the General Counsel argues that Respondent Justice violated sections 7116(a)(1) and (5) of the Statute. *Id.* at 11.

As a remedy, the General Counsel requests that: (1) Respondent Justice be ordered to rescind its January 13, 1989, disapproval of Article 32, Section B; (2) Respondent INS be ordered to implement immediately the parties' collective bargaining agreement retroactive to January 13, 1989, the date on which the agreement became enforceable; and (3) an appropriate notice be posted throughout the bargaining unit. *Id.* at 11-12.

#### C. The Union

The Union asserts that the interest arbitration award dated September 25, 1987, became final and binding under section 7122 of the Statute on January 6, 1989.\*3 Union's Brief at 7. According to the Union, January 6, 1989, is the date on which the parties completed renegotiations as directed by the Authority in Immigration and Naturalization Service and, consequently, is the date on which the agreement became effective. The Union argues that the failure to implement the interest arbitration award as of January 6, 1989, violates sections 7116(a)(1) and (5) of the Statute.

The Union also argues that the Respondents may not collaterally attack the arbitration award through this unfair labor practice proceeding. *Id.* at 8. The Union adds that any question as to the legality of the award should have been raised in the exceptions to

the award.

The Union further argues that the Authority's Decision and Order on Remand following issuance of DODDS is not applicable because the conditions that were identified by the Authority as authorizing agency head review of interest arbitration awards, such as both parties requesting Panel assistance and a Panel designee serving as interest arbitrator, are not present here. *Id.* at 9. The Union adds that the Authority's dismissal of the petition for review in Department of Justice is not affected by the decision in DODDS and that the agency head does not have review authority under section 7114(c) in this case. *Id.* at 9-10.

With regard to Respondent Justice's disapproval of the revised Article 32, Section B, the Union argues that the revised provision is within the duty to bargain based on National Treasury Employees Union. *Id.* at 10. The Union claims that the need for the information specified in the provision is essentially the same as was discussed in that case and in Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 25 FLRA 1060 (1987) (AAFES). *Id.* The Union notes that its "expressed intent is to safeguard the information obtained and to limit its access, consistent with the [stated] purposes." *Id.* at 11.

Finally, the Union argues that Respondent Justice's disapproval of Article 32, Section B, is not provided for by law and is contrary to the Authority's order in Immigration and Naturalization Service that the parties bargain over the matter. *Id.* The Union argues that since there was no right to agency head review of the interest arbitration award, there was no right to review "post-exception bargaining . . ." *Id.* at 12.

As a remedy, the Union requests retroactive implementation of the award to January 6, 1989. *Id.* The Union states that both it and unit employees have been harmed by the failure to implement the award and will continue to be harmed unless the agreement is given retroactive effect. The Union cites the provisions of the agreement concerning uniform

allowance and payment of travel and per diem for union negotiators, among others, to demonstrate the types of losses that have been incurred. *Id.* at 13-14. The Union also cites American Federation of Government Employees, AFL-CIO v. FLRA, 785 F.2d 333 (D.C. Cir. 1986), to support its view that a status quo ante remedy is appropriate in this case.

#### IV. Analysis and Conclusions

As we noted at the outset of our decision, this case presents an opportunity to review case law in the area of interest arbitration. The Authority is guided, in this regard, by the arguments raised by the parties as well as court decisions in related cases. Our analysis begins with a review of the court decisions.

##### A. Court Decisions

In DODDS, 852 F.2d 779, the United States Court of Appeals for the Fourth Circuit rejected the Authority's position that agency heads are not empowered to review provisions directed to be included in collective bargaining agreements as a result of interest arbitration awards. The court found that where parties reach an impasse in their negotiations, they may either request the services of the Panel to consider the matter under section 7119(b)(1), or may agree to binding arbitration under section 7119(b)(2), if the procedure is approved by the Panel. *Id.* at 783. The court further found that when assistance is provided under section 7119(b)(1), the Panel's decision is subject to agency head review under section 7114(c), regardless of whether the decision was issued by the Panel itself or by a Panel designee. *Id.* at 784. The court also discussed the applicability of section 7122 of the Statute and concluded that a decision of a Panel designee does not constitute binding arbitration which is subject to the filing of exceptions and review under section 7122. However, review under section 7122 would be available to either party dissatisfied with an arbitration award issued pursuant to section 7119(b)(2).

On remand from the Fourth Circuit, the Authority issued DODDS (Alexandria), 33 FLRA

659. The Authority adopted the court's conclusion that a decision of a Panel designee who serves as an interest arbitrator is subject to review under section 7114(c) when: (1) the parties seek Panel assistance; and (2) the Panel directs the parties to interest arbitration and designates one of its members to act as the interest arbitrator. *Id.* at 662.

Subsequent to the Authority's decision on remand, the Fourth Circuit issued three other decisions finding that agency heads may review provisions directed to be included in an agreement by the Panel acting pursuant to section 7119(b)(1). In *Department of Defense, Office of Dependents Schools v. FLRA*, 879 F.2d 1220 (4th Cir. 1989) (*Office of Dependents Schools*), the court held that the decision of a private arbitrator, to whom the parties had been directed by the Panel under section 7119(b)(1), was subject to section 7114(c) review. *Id.* at 1224. The court also stated that it is only when parties voluntarily agree to binding arbitration that the agency should not be permitted to review the terms imposed by the arbitrator.

In *Defense Logistics Agency v. FLRA*, 882 F.2d 104 (4th Cir. 1989) (*DLA*), the court denied enforcement of the Authority's finding of an unfair labor practice, based on the failure to implement an interest arbitration award to which no exceptions had been filed timely under section 7122 of the Statute, and remanded the case to the Authority to consider the agency's position on the merits. Again, the court concluded that the agency head was empowered to review the imposed provision because the Panel had acted pursuant to the parties' request for assistance under section 7119(b)(1). The court noted that there had been no agreement to binding arbitration under section 7119(b)(2), to which exceptions could have been filed under section 7122. The Authority's decision on remand, in which it adopted the court's decision and considered the merits of the provision, was issued in *Defense Logistics Agency, Defense General Supply Center, Richmond, Virginia*, 37 FLRA No. 74 (1990).

Most recently, in *Patent and Trademark Office,*

*Department of Commerce v. FLRA*, Nos. 87-3877 and 87-3878 (4th Cir. Jan. 17, 1990), the Fourth Circuit granted the agency's motion for summary reversal of two decisions, in which the Authority dismissed negotiability appeals on the basis that agency heads were not empowered to review the provisions resulting from interest arbitration awards.

United States Courts of Appeals for the Fifth and the Ninth Circuits have taken the same position as the Fourth Circuit concerning section 7114(c) review. In *Panama Canal Commission v. FLRA*, 867 F.2d 905 (5th Cir. 1989) (*Panama Canal Commission*), the court found that where both parties agree to binding interest arbitration under section 7119(b)(2), the interest arbitration award is reviewable under section 7122, but is not subject to agency head review. *Id.* at 908. On the other hand, the court held that where an impasse is referred to the Panel under section 7119(b)(1), the agency head does not waive the right to review under section 7114(c). The court's decision was adopted by the Authority in *International Organization of Masters, Mates and Pilots and Panama Canal Commission*, 36 FLRA 555 (1990).

Finally, in *Department of Agriculture, Food and Nutrition Service, Western Region v. FLRA*, 895 F.2d 1239 (9th Cir. 1990) (*Department of Agriculture*), vacating in part, 879 F.2d 655 (9th Cir. 1989), the Ninth Circuit adopted the view of the other circuits that agency heads are empowered to review provisions arising from interest arbitration imposed by the Panel. *Id.* at 1240. However, the court posed for resolution on remand, the following question: "does the agency head forfeit the right of review when the parties agree to interest arbitration pursuant to the Panel's recommendation after one party requests the Panel's assistance under [section] 7119(b)(1)?" *Id.* at 1241. The remand is currently pending with the Authority.

#### B. Authority of the Panel to Direct Parties to Interest Arbitration

The Respondents argue that the Panel exceeded its jurisdiction by directing the parties to outside interest arbitration under section 7119(b)(1). We do

not agree.

We find no support for the Respondents' contention in section 7119 of the Statute, its legislative history, or the court decisions discussed above. As we explained in *Immigration and Naturalization Service*, 31 FLRA 1123-24, when this same argument was raised by the Respondents, the use of interest arbitration to resolve negotiation impasses arises in one of two ways: (1) the Panel may direct the parties to interest arbitration when a request for Panel assistance is made under section 7119(b)(1); or (2) the Panel can approve a joint request for interest arbitration under section 7119(b)(2). We noted that nothing in the Statute restricts the power of the Panel to direct interest arbitration; that section 7119 expressly authorizes the Panel to take whatever action it deems necessary to resolve an impasse; that in enacting the Statute, Congress left unchanged the authority of the Panel to direct parties to binding interest arbitration under Executive Order 11491, as amended; and that the use of interest arbitration effectuates the purposes and policies of the Statute by facilitating the settlement of disputes. 31 FLRA at 1126-28.

Nothing in the court decisions discussed above suggests a contrary result. Rather, the courts have sanctioned the use of interest arbitration under section 7119(b)(1), including arbitration conducted by a private, outside arbitrator. See *Office of Dependents Schools*. Accordingly, and in the absence of any basis on which to sustain the Respondents' contention, we reaffirm our view that section 7119(b)(1) empowers the Panel to direct parties to the use of interest arbitration. Such arbitration may be conducted by a private, outside arbitrator, or by a Panel Member or the Panel staff itself.

Thus far, our discussion has centered on interest arbitration directed by the Panel under section 7119(b)(1). While there is no argument to the contrary, we note here that parties may continue to submit joint requests for binding interest arbitration under section 7119(b)(2) of the Statute. The Panel clearly retains the authority to approve requests for

interest arbitration by the very language of that section.\*4

C. Provisions Imposed as a Result of Interest Arbitration Under Section 7119(b)(1) May Be Reviewed Under Section 7114(c), but May Not Be Excepted to Under Section 7122(a)

In prior decisions, the Authority viewed interest arbitration awards issued pursuant to Panel directed interest arbitration under section 7119(b)(1), as awards to which exceptions could be filed under section 7122(a). We will no longer adhere to that statutory interpretation.

For the reasons expressed by the courts in *DODDS*, *Office of Dependents Schools*, *DLA*, *Panama Canal Commission*, and *Department of Agriculture*, we now find that where the Panel directs parties to interest arbitration under section 7119(b)(1), the agency head retains the right to review the imposed provisions under section 7114(c).\*5 Consequently, in this and in future cases, we will no longer follow prior Authority decisions that limited the right of an agency head to conduct a review under section 7114(c) where interest arbitration resulted from parties having sought Panel assistance under section 7119(b)(1).

We further conclude, as more fully set forth in *DODDS*, that interest arbitration directed by the Panel under section 7119(b)(1) of the Statute does not constitute binding arbitration to which exceptions can be filed under section 7122(a).\*6 Consequently, the Authority will no longer entertain, as exceptions to an award, challenges to contract provisions imposed as a result of interest arbitration under section 7119(b)(1) of the Statute.\*7

Moreover, in view of our finding that agency heads retain the authority to review provisions imposed as a result of Panel directed interest arbitration, we find also that such provisions are subject to challenge on the same bases as other Panel decisions rendered pursuant to section 7119 of the Statute.

In *Interpretation and Guidance*, 15 FLRA 564

(1984), *aff'd sub nom. American Federation of Government Employees, AFL-CIO v. FLRA*, 778 F.2d 850 (D.C. Cir. 1985), the Authority discussed agency head review of Panel imposed provisions and described the basis for challenging the agency head's determination. The Authority held that "pursuant to the provisions of section 7114(c), agency heads are empowered to review ALL provisions of collective bargaining agreements, including those mandated by the Panel, to assure conformity with the provisions of the Statute as well as other applicable laws, rules, and regulations." *Interpretation and Guidance*, 15 FLRA at 567 (emphasis in original). See also *National Association of Government Employees, Local R4-75 and U.S. Department of the Interior, National Park Service, Blue Ridge Parkway*, 24 FLRA 56, 62 (1986) ("agreement provisions may not be disapproved by an agency head under section 7114(c) simply because they relate to section 7106(b)(1) matters"). The Authority also held that a union wishing to challenge the agency head's determination could obtain review of the determination either through the negotiability procedures of section 7117 of the Statute or through the unfair labor practice procedures established in section 7118 of the Statute.

Applying these principles to this case, we find that the Respondent was authorized to review the provisions directed to be included in the parties' collective bargaining agreement and, further, that the Union could appropriately challenge the agency head's disapproval through the unfair labor practice procedures of the Statute and our Rules and Regulations.

#### D. Merits of the Unfair Labor Practice Complaint

Before addressing the merits of the complaint, we note the Respondents' contention that the unfair labor practice charge was untimely filed. We do not agree. The conduct alleged to constitute the unfair labor practice occurred in January 1989. The original charge in this case was filed on February 28, 1989, well within the 6-month filing deadline under section 7118(a)(4)(A) of the Statute. Consequently, the

charge was timely filed.

We turn now to the allegations of the complaint.

#### 1. Respondent Justice did not violate the Statute

The complaint alleges that Respondent Justice violated sections 7116(a)(1) and (8) of the Statute by disapproving the renegotiated Article 32, Section B which, according to the General Counsel, is not materially different from provisions previously found negotiable by the Authority in *National Treasury Employees Union*, 32 FLRA 62. The complaint also alleges that Respondent Justice violated sections 7116(a)(1) and (5) by interfering with the bargaining relationship between Respondent INS and the Union inasmuch as the disapproval resulted in Respondent INS' refusal to implement the agreement.

In order to determine whether the Respondent's conduct violated the Statute, it is necessary to decide whether there was an obligation to bargain over Article 32, Section B. As explained below, we find the disclosure of information required by the provision is barred by the Privacy Act. Consequently, Respondent Justice's disapproval of the provision was proper and no violation of the Statute was committed.

#### a. Merits of the provision

Article 32, Section B provides:

When the Union is not designated as the representative in a disciplinary or adverse action, copies of the notice of proposed action, final action taken, and the decision(s) on any subsequent appeals, will be furnished to the Union by certified mail. It is understood that such information is sensitive in nature and will be used only for purposes authorized by the CSRA and this Agreement. The Union agrees to provide the Service with a list of representatives designated to receive such notices.

In relevant part, the provision requires Respondent INS to provide the Union with copies of notices of proposed disciplinary and adverse actions, final actions taken, and decisions on subsequent appeals, when the Union has not been designated as the representative of the affected employee. The provision further states that, as the information is

"sensitive," the information will be used only for certain authorized purposes. The provision does not provide for the information to be sanitized in any way, either by removing the names of the affected employees or omitting any other identifying material. We note, in this regard, that the parties' arguments clearly indicate that the provision is intended to require the furnishing of unsanitized documents.

The Respondents argue that the provision conflicts with the Privacy Act. The Respondents also argue that the provision is outside the duty to bargain because it is inconsistent with Federal and private sector case law. The General Counsel and the Union argue that the provision is negotiable because it is not materially different from provisions found negotiable by the Authority in *National Treasury Employees Union*, 32 FLRA 62. The Respondents' reply asserts that *National Treasury Employees Union* was incorrectly decided.

The Union further claims that its need for the information is essentially the same as that discussed in *National Treasury Employees Union* and *AAFES*, 25 FLRA 1060. More particularly, the Union states that, as the representative of all bargaining unit employees, it must be provided with information that is germane to the administration of the parties' collective bargaining agreement, future negotiations, and other representational responsibilities. The Union maintains that it is entitled to the information notwithstanding the fact that an employee who is subject to disciplinary or adverse action may decline Union representation. Finally, the Union notes that its intent is to safeguard the information and limit its access.

The Authority previously has found that the Privacy Act, 5 U.S.C. 552a, generally prohibits disclosure of personal information about Federal employees without their consent. See generally, *U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 37 FLRA 515 (1990) (*Portsmouth Naval Shipyard*), application for enforcement filed sub nom. *FLRA v. U.S. Department of the Navy, Portsmouth Naval Shipyard*,

*Portsmouth, New Hampshire*, No. 90-1949 (1st Cir. Oct. 1, 1990), and *Department of Defense, Office of Dependents Schools and Overseas Education Association*, 28 FLRA 871, 881 (1987) (*Overseas Education Association*). However, the Privacy Act's bar to disclosure is not applicable if disclosure of such information is required by the Freedom of Information Act (FOIA). Under the FOIA, 5 U.S.C. 552, information must be disclosed unless it falls within one of the enumerated exceptions. Of relevance here is exemption (b)(6), which authorizes withholding information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

In assessing whether requested information is exempt from disclosure under FOIA exemption (b)(6), an individual's right to privacy must be balanced against the public interest in having the information disclosed. In our view, the same balancing test must be applied in cases involving the review of negotiated provisions as is applied in resolving disputes resulting from a request for data under section 7114(b)(4) of the Statute. Moreover, as indicated in *Portsmouth Naval Shipyard*, the public interest to be examined, when applying the balancing test required by exemption (b)(6), is that embodied in the Statute.

Applying the balancing test here, we find that employees' privacy interests outweigh the public interest in disclosure. Consequently, disclosure of the information would result in a clearly unwarranted invasion of the employees' personal privacy.

As indicated, the provision would require the release of unsanitized information pertaining to disciplinary and adverse actions without the affected employee's consent, and when the Union has not been designated as the employee's representative. The Authority previously has found that employees have a strong privacy interest in certain types of information and that the release of that information can be stigmatizing to the employees. In *Overseas Education Association*, for example, the Authority concluded

that the release of employees' performance ratings in an unsanitized form would have constituted a clearly unwarranted invasion of personal privacy, noting that the interests of the union did not outweigh the invasion of employees' personal privacy. In *National Treasury Employees Union*, the Authority also recognized that unsanitized information in disciplinary and adverse action letters can be stigmatizing. However, the Authority concluded that the public's interest in disclosure of the information outweighed the employees' privacy interests.

In our view, there are few workplace matters that evoke such significant privacy interests as disciplinary and adverse actions that are proposed to be taken, or are taken, against employees. These actions generally connote negative conduct or performance on the part of an employee. The personal embarrassment as well as the stigmatizing effect these actions have must be weighed heavily in assessing the employee's privacy interest. Even if the disciplinary or adverse action does not proceed beyond the proposed stage, the employee's name has been connected with some alleged deficiency or wrongdoing.

Moreover, when faced with a proposed or impending disciplinary or adverse action, an affected employee has a choice of possible actions. The employee may remain silent, for example, and accept the action. Alternatively, the employee may contest the action. In that case, the employee may make an initial approach to management in an effort to resolve the matter. If the employee desires representation, the employee may seek the assistance of his or her union representative or the assistance of counsel or some other party.\*8 In any event, the choice is that of the employee. An element of the employee's decision as to who will serve as representative may involve a decision as to who will have access to information that may be embarrassing or stigmatizing to the employee. Notwithstanding the Union's assertion here that it would limit access to the "sensitive" information, if the employee chooses not to have the Union act as the representative, the choice may have

been based, at least in part, on a decision not to disclose the information to the Union.

We do not hold that the Union has no interest in information pertaining to disciplinary and adverse actions. Clearly, it does. In fact, the Union has a significant interest in the information as it may be used to determine whether to pursue grievances on behalf of unit employees, to assist in the representation of employees, to administer the provisions of collective bargaining agreements, to ensure that management is complying with various laws, rules, and regulations, and to use as a basis for future negotiations. Moreover, in addition to the Union's particular representational interests, the public in general has a strong interest in the manner in which the Government disciplines Federal employees. See *Department of the Air Force v. Rose*, 425 U.S. 352, 369 (1976) (Supreme Court found "a genuine and significant public interest[]" in disclosure of summaries of honor and ethics code hearings, with personal references and other identifying information deleted, involving Air Force Academy cadets).

Consistent with the foregoing discussion, we find that the employees' privacy interests in proposed and final disciplinary and adverse actions and the public's interest in disclosure of the information to the Union are significant. On balance, however, we find that public interests in blanket, unsanitized disclosure of all proposed and final disciplinary and adverse actions to the Union, without an expressed, particularized need for the actions, are not sufficient to outweigh the strong privacy interests of employees. Accordingly, we conclude that the disclosure required by the disputed provision would constitute a clearly unwarranted invasion of the affected employees' personal privacy within the meaning of exemption (b)(6) of the FOIA, 5 U.S.C. 552(b)(6). As such, disclosure of the information is prohibited by the Privacy Act, 5 U.S.C. 552a.

We emphasize that our conclusion here does not foreclose the Union from requesting specific information, including information that is unsanitized, under section 7114(b)(4) of the Statute. The Authority

would then balance the competing interests in determining whether disclosure of the information is consistent with law. See, for example, AAFES, 25 FLRA 1060 (disclosure of information concerning the removal of two employees for theft was not barred by the Privacy Act because the public interest in disclosure outweighed the invasion of privacy resulting from disclosure); and Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region, 28 FLRA 202 (1987) (agency required to provide the union with information concerning the discipline of supervisors and management officials). See also National Labor Relations Board, Office of the General Counsel, Washington, D.C. and National Labor Relations Board Union, 37 FLRA No. 84 (1990) (Authority denied agency's exceptions to an arbitration award directing the agency to provide the union with certain unsanitized performance appraisal information that was necessary to enable the union to monitor the agency's performance appraisal system).

Finally, we note the General Counsel's and the Union's reliance on the Authority's decision in National Treasury Employees Union. The two relevant provisions in National Treasury Employees Union provided that copies of disciplinary and adverse action decision letters would be sent to the union. The Authority determined that release of the decision letters was authorized without regard to whether the information was relevant and necessary under section 7114(b)(4) of the Statute or whether the union represented the affected employee. 32 FLRA at 69. The Authority further found that release of the information did not conflict with the Privacy Act. *Id.* In this latter regard, the Authority found that the public interest in ensuring that Federal agencies comply with their responsibilities in disciplining and removing employees outweighed an individual employee's privacy interests. *Id.* at 71.

As we have stated, a balancing test assessing employees' privacy interests and the public's interest in disclosure must be utilized in order to determine

whether the disclosure of information is authorized by law. Such a balancing test takes into account the facts and circumstances unique to each case. Here, in the context of a proposal requiring the blanket disclosure of all proposed and final disciplinary and adverse actions, we have found that the balance tilts in favor of protecting employees' privacy interests. In National Treasury Employees Union, involving proposals different from the one here, the balance was found to tilt in favor of disclosure based on the facts and circumstances present there. As each case must be decided on its own facts, we do not here overrule National Treasury Employees Union. However, to the extent that National Treasury Employees Union suggests that, in every case, the union's interest in disclosure of information relating to disciplinary and adverse actions will outweigh the affected employees' privacy interests in the information, we will not adhere to it.

Our conclusion in this case is unaffected by our decision in Portsmouth Naval Shipyard, 37 FLRA 515. In that case, we discussed the relationship between the Privacy Act, the FOIA, and the Statute, in authorizing the release of names and home addresses of bargaining unit employees to their exclusive representatives. We found that the release of names and home addresses was not prohibited by law, was necessary for unions to fulfill their representational responsibilities under the Statute, and met all the other requirements of section 7114(b)(4) of the Statute. In reaching that conclusion, we found that the public interest in disclosure was substantial while the invasion of personal privacy was minimal.

By contrast, the invasion of personal privacy involved here is not minimal. Rather, the privacy interests of affected employees in information pertaining to disciplinary and adverse actions compels the conclusion that the privacy interests clearly outweigh the public interest in disclosure of the information to the Union.

b. Merits of the unfair labor practice allegation

As indicated, the complaint alleges that Respondent Justice violated the Statute by

disapproving Article 32, Section B, and by interfering with the bargaining relationship between the Union and Respondent INS.

The Authority previously has found that an agency commits an unfair labor practice by refusing to bargain over a proposal that is not materially different from one previously found negotiable by the Authority. See, for example, Internal Revenue Service, 32 FLRA 57 (1988); Department of the Air Force, U.S. Air Force Academy, 6 FLRA 548 (1981), *aff'd sub nom. Department of the Air Force, United States Air Force Academy v. FLRA*, 717 F.2d 1314 (10th Cir. 1983). Additionally, an agency commits an unfair labor practice by disapproving a provision imposed by the Panel which the Authority subsequently finds, in either an unfair labor practice or negotiability proceeding, was not contrary to the Statute or any other law, rule, or regulation. See Department of the Treasury and Internal Revenue Service, 22 FLRA 821 (1986).

The mere act of reviewing provisions imposed by the Panel does not constitute a violation of the Statute, however. U.S. Department of Army, Headquarters, and DARCOM HQ, 17 FLRA 84 (1985), *aff'd in relevant part sub nom. National Federation of Federal Employees v. FLRA*, 789 F.2d 944 (D.C. Cir. 1986). Additionally, no unfair labor practice occurs where an agency disapproves a provision that is found to be outside the duty to bargain.

Here, we have concluded that disclosure of the information required by the disputed provision would violate the Privacy Act. Therefore, Respondent Justice properly disapproved Article 32, Section B. Consequently, the disapproval did not violate the Statute, as alleged. The Union's argument that Respondent Justice was not authorized to review the renegotiated Article 32, Section B, and that its conduct in doing so violated the Statute, is without merit. The Authority has held that an agency head may review any revised agreement that is reached following disapproval of portions of a locally executed agreement. See U.S. Department of the

Army, Watervliet Arsenal, Watervliet, New York, 34 FLRA 98, 105 (1989) (Watervliet Arsenal). Here, we find that the act of reviewing the revised Article 32, Section B, that was renegotiated as a result of the agency head's disapproval, did not violate the Statute.

As Respondent Justice properly disapproved Article 32, Section B, there is no basis on which to find that the disapproval unlawfully interfered with the bargaining relationship between Respondent INS and the Union. Therefore, this allegation of the complaint is without merit.

#### 2. Respondent INS did not violate the Statute

The General Counsel and the Union argue that Respondent INS failed to implement the agreement as of the date on which Respondent Justice improperly disapproved the renegotiated Article 32, Section B (according to the Union, this date was January 6, 1989; the General Counsel asserts that it was January 13, 1989). We disagree.

It is well established that where an agency head timely disapproves an agreement under section 7114(c), the agreement does not take effect and it is not binding on the parties. See, for example, Watervliet Arsenal, 34 FLRA at 105. The parties are then free to renegotiate the disapproved provisions and the agency head may review the renegotiated provisions. Alternatively, the union may challenge the agency head's disapproval by filing a petition for review or an unfair labor practice charge. During the time that the parties are renegotiating, or the matter is pending before the Authority, there is no obligation to implement the portions of the agreement not disapproved, unless the parties agree to do so. See Department of the Interior, National Park Service, Colonial National Historical Park, Yorktown, Virginia, 20 FLRA 537, 541 (1985), *aff'd sub nom. National Association of Government Employees, Local R4-68 v. FLRA*, 802 F.2d 1484 (4th Cir. 1986).

Here, after Respondent Justice properly disapproved the renegotiated Article 32, Section B, there was an outstanding dispute as to the negotiability of the provision. The Union challenged

the disapproval by filing both a petition for review and an unfair labor practice charge. Respondent INS was not obligated to implement the agreement or the portions of the agreement that were not disapproved for two reasons. First, as we have indicated, an agreement that is timely disapproved does not take effect. Therefore, because Respondent Justice disapproved the renegotiated provision, there was no agreement in effect for Respondent INS to implement. Second, there is no evidence in the record that the parties agreed to implement any portions of the agreement that were not disapproved. Consequently, Respondent INS was not obligated to implement those provisions of the agreement.

Based on the foregoing, we conclude that the failure of Respondent INS to implement the agreement did not violate the Statute, as alleged.

### 3. Status of Parties' Agreement

One additional claim made by the Respondents must be addressed.

The Respondents claim that the agency head's disapproval of October 23, 1987, is still valid as to the provisions which were not ruled on by the Authority in either Immigration and Naturalization Service or Department of Justice. Respondent's Brief at 53. More specifically, the Respondents indicate that there were provisions disapproved by the agency head, which were not excepted to, but concerning which the Union sought review through the filing of a petition for review. When the Authority dismissed the petition in Department of Justice, the Respondents contend, the Authority left unresolved the negotiability of those provisions.

Assuming that the Respondents are correct and that there were provisions in Department of Justice that were disapproved by the agency head but not addressed by the Authority in Immigration and Naturalization Service, neither the General Counsel nor the Union argues here that those matters are still in dispute. In fact, one of the underlying bases of the unfair labor practice complaint is the alleged failure to implement the agreement in January 1989. Thus, both

the General Counsel and the Union maintain that the agreement was a final document as of January 1989; neither the General Counsel nor the Union assert that any matters remain unresolved.

Based on the record of this case, therefore, we find no evidence to indicate that the provisions referenced by the Respondents as still being in dispute are, in fact, in dispute. Consequently, the Respondents' contention that portions of its October 23, 1987, disapproval are still valid, is without merit.

As Article 32, Section B was the only provision in dispute and, as we have now resolved its negotiability, there are no outstanding issues in this proceeding which need to be addressed. We are mindful of the fact that, as noted by the Union, the parties have been unable to conclude a collective bargaining agreement to replace the previous one negotiated in 1976. It is now within the parties' prerogative to determine what action they wish to take that will culminate in a collective bargaining agreement. For example, insofar as Article 32, Section B was found to be properly disapproved, the Union may seek to renegotiate the provision, consistent with this decision. On the other hand, the Union may decide not to seek renegotiations, in which case there is no remaining impediment to implementation of the parties' agreement. The manner of implementation, as well as the effective date of the agreement, is within the purview of the parties. It is our sincere desire that the parties will act expeditiously in finalizing their agreement.

### V. Summary

To summarize our holdings in this case, we find that the Panel is empowered to direct parties to the use of interest arbitration under section 7119(b)(1) of the Statute. Where contract language is imposed as a result of interest arbitration under section 7119(b)(1), an agency head retains the right to review the language under section 7114(c). Challenges to the agency head's disapproval may be brought under the negotiability or the unfair labor practice procedures of the Statute and the Authority's Rules and Regulations. The Authority will no longer entertain exceptions

filed under section 7122(a) to contract provisions imposed as a result of interest arbitration under section 7119(b)(1) of the Statute.

In this case, we find that no violations of the Statute were committed by either Respondent Justice or Respondent INS. Therefore, the complaint must be dismissed.

VI. Order

The complaint is dismissed.

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1. An "Order Amending Decision" granting the Union's request to clarify the Authority's decision was issued in United States Department of Justice, Immigration and Naturalization Service and American Federation of Government Employees, National Border Patrol Council, 32 FLRA 89 (1988).

2. The Union also filed a petition for review of Respondent Justice's disapproval of the ten provisions of Article 32. That petition for review, captioned Case No. 0-NG-1657, has been held in abeyance pending resolution of this unfair labor practice case, which the Union elected to process first under section 2424.5 of the Authority's Rules and Regulations.

3. We note that the General Counsel and the Union assert that the parties' agreement became enforceable on different dates. In view of our decision, it is not necessary to resolve this dispute.

4. In fact, parties are encouraged to agree on procedures for binding arbitration of negotiation impasses. See National Treasury Employees Union and Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 35 FLRA 26 (1990).

5. As there was no agreement by Respondent INS to use binding interest arbitration in this case, we do not pass on the question raised by the Ninth Circuit in Department of Agriculture concerning an agency head's right to conduct a section 7114(c) review where the parties have agreed to a Panel recommendation for interest arbitration under section 7119(b)(1) of the Statute.

6. As the issue is not before us in this case, we

do not address whether exceptions may be filed to interest arbitration awards issued following Panel approval of a joint request under section 7119(b)(2) of the Statute. We note, however, that Courts of Appeals for the Fourth and Fifth Circuits have suggested that when both parties voluntarily agree to binding arbitration under section 7119(b)(2), the agency head may not review provisions imposed by the arbitrator, but the Authority may review any exceptions to the award filed under section 7122. See, DLA, 882 F.2d at 106, Office of Dependents Schools, 879 F.2d at 1224, and Panama Canal Commission, 867 F.2d at 908.

7. Decisions concerning application of this policy to cases currently pending with the Authority on exceptions to the awards of interest arbitrators acting pursuant to section 7119(b)(1) will be made in the context of those cases.

8. Section 7114(a)(5) of the Statute provides that an employee may be represented "by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action[.]"