[ORAL ARGUMENT HELD APRIL 4, 2019]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et. al,	)	
Appellees	)	
v.	)	No. 18-5289
DONALD J. TRUMP, in his official capacity as President of the United States, et. al,	)	
Appellants.	)	

APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO EXPEDITE ISSUANCE OF MANDATE, OR TO STAY INJUNCTION PENDING ISSUANCE OF MANDATE

Appellees respectfully submit this opposition to Appellants' Motion to Expedite Issuance of Mandate, or to Stay Injunction Pending Issuance of Mandate (July 23, 2019). The government has failed to show the requisite "good cause" that would warrant disrupting the Court's ordinary processes, and accordingly its motion should be denied. See D.C. Circuit Rule 41(a).

The district court's injunction simply maintains the status quo put into effect by Congress in 1978 through its statutory collective bargaining scheme. There is no harm, irreparable or otherwise, from keeping that 40-year status quo in place while the normal appellate process plays out. Furthermore, the government cannot show injury when it has previously represented that the Executive Orders do not substantially affect current collective bargaining agreements and will result in only a "gradual" change in the federal sector. See infra pages 6-8. If the effects of the Executive Orders are, according to the government, so modest, then continuing the injunction of such modest changes cannot result in any serious harm.

In addition, the government's own actions belie its claim that there is an urgent need to short-circuit the timelines set forth in the Court's rules. The government waited more than a month to file its appeal in this case. It waited seven days to file the instant motion. It waited 11 months for its alternative request that the district court's injunction be stayed. The government therefore cannot justify asking this Court to disrupt its schedule and order immediate issuance of the mandate.

For these reasons, and for the reasons set forth below, the government's motion should be denied.

ARGUMENT

A. Background

Federal employee collective bargaining rights have been governed by the same authority since 1978. That is when Congress enacted the Civil Service Reform Act of 1978 (the Act), which "comprehensively overhauled the civil service system." Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 773 (1985).

As a central piece of this extensive federal civil service reform, Congress enacted the Federal Service Labor-Management Relations Statute (the Statute), explicitly finding "the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them . . . safeguards the public interest." 5 U.S.C. § 7101(a)(1). The Statute spells out what topics must, may, or cannot be collectively bargained. See 5 U.S.C. Ch. 71.

The President, through three Executive Orders issued on May 25, 2018, attempted to override Congress's determination of the scope of

collective bargaining and, where bargaining was allowed under the orders, attempted illegally to dictate federal agencies' bargaining positions. See AFGE v. Trump, 318 F. Supp. 3d 370 (D.D.C. 2018). Upon review, the district court declared unlawful and enjoined implementation of thirteen key provisions across the three orders that impermissibly conflicted with Congress's statutory collective bargaining scheme. Id. at 440. The Executive Orders' implementation date was July 9, 2018, and therefore they were in effect for only a month and a half.[1] Apart from that brief period, the Act and the Statute have governed federal employee collective bargaining rights for four decades.

B. The Government's Request to Expedite Issuance of the Mandate Should be Denied.

1. This Court has already rebuffed, in large part, the government's efforts to alter the ordinary timing of the Court's review process. The government previously moved to expedite its appeal in this case on September 28, 2018. In its order on that motion, this Court concluded that "Appellants have not articulated 'strongly compelling' reasons why 'delay will cause irreparable injury' . . . or why 'the public

[1] See Notice of Response, Dkt. No. 15, Case No. 1:18-cv-01261-KBJ (filed June 18, 2018) (confirming July 9 as implementation date).

generally, or . . . persons not before the Court, have an unusual interest in prompt disposition.'" Order (Oct. 18, 2018).[2]

The same is true with this motion. The government has not met this Court's "good cause" standard for issuing the mandate in advance of the Court's normal timetable. The government has shown neither a compelling reason for deviating from this process, nor has it established why the public has any unusual interest in prompt disposition of this matter.

2. The government cannot show irreparable injury from the district court's injunction for several reasons. As noted above, the injunction simply preserves the collective bargaining system that has been in place since 1978, with the exception of the month and a half that the Executive Orders were in effect. See Aamer v. Obama, 742 F.3d 1023, 1043 (D.C. Cir. 2014) (the "primary 'purpose'" of an injunction is to preserve the status quo). While the appellants might be dissatisfied with this longstanding status quo and the district court's

[2] The Court only granted the government's request to dispense with separate briefing on dispositive and jurisdictional issues. Order (Oct. 18, 2018).

invalidation of their attempt to alter it, the continuation of that dissatisfaction during the appeal is not irreparable injury.

To the contrary, if the Executive Orders go into effect, it is the appellee unions who will suffer immediate and ongoing injury while their challenges to those Orders await prolonged and piecemeal adjudication before the Federal Labor Relations Authority (FLRA). This Court's opinion did not find that any particular provision of the orders was a permissible exercise of Executive power. But the appellee unions will nonetheless be forced to grapple with new extra-statutory requirements and negotiations in which the long-established and statutorily-mandated scope of bargaining will have been sharply limited. See, e.g., Executive Order 13837, § 4.

a. In addition, the government's claims of irreparable injury are contradicted by its counsel's own representations to the district court. Government counsel stressed to the district court that the Executive Orders would not substantially alter the collective bargaining landscape. Counsel argued that "the Orders themselves will not substantially affect any federal employees' rights under any current collective bargaining agreement. Rather, the Orders' substantive

provisions will begin affecting federal employees covered by collective bargaining agreements only as those CBAs come up for renegotiation."[3]

Government counsel also underscored, during a telephonic hearing with the district court, that implementing the Executive Orders would be a "gradual process" because (1) "there are many, many, many bargaining units in the federal workforce"; (2) "each one of those units has a different collective bargaining agreement"; (3) "there are many different agencies involved in those negotiations with each individual unit,"; and (4) "it's really somewhat in the agency's discretion subject to the provisions of the collective bargaining agreement as to when that agreement expired, when negotiations can be reopened, whether there's provisions in that agreement for midterm negotiations or whether the agreements are considered open collective bargaining agreements."[4]

And even where a collective bargaining agreement would allow for implementation of the provisions, counsel for the government contended that nothing would immediately alter the status quo because

[3] Notice of Response at 2, Dkt. No. 15, Case No. 1:18-cv-01261-KBJ (filed June 18, 2018).

[4] Transcript of Telephone Conference Held Before the Honorable Ketanji B. Jackson, United States District Judge on June 18, 2018 at 8-9, Dkt. No. 28, Case No. 1:18-cv-01261-KBJ, at 8 (issued June 25, 2018).

"there's still a negotiation process that has to play out and that takes time." Id. at 13. If, as the government posits, the Executive Orders do not cause any significant change to federal collective bargaining, then no irreparable injury can flow from enjoining this allegedly modest disruption to that scheme.

b. The government nonetheless now argues that enjoining the Orders "creates uncertainty" for agency negotiators. Motion at 6. The government cites no case law for how mere "uncertainty" rises to the level of irreparable harm. It tellingly offers no factual support for this alleged "uncertainty," instead making only generalized claims that "[w]e are informed" about ongoing negotiations in several agencies. Motion at 5. It cites to nothing in the record to support this claim of uncertainty.

As a common sense matter, an injunction cannot "create[] uncertainty for agency negotiators" (Motion at 6) when it merely preserves the 40-year status quo under which agencies have negotiated hundreds of collective bargaining agreements. To the contrary, it is issuance of the mandate before the appellate process has run its course that will create uncertainty for unions and agencies alike. The

government itself acknowledges that the result of the Executive Orders, if allowed to go into effect, will be multiple piecemeal disputes before the FLRA. See id. at 7. And even more chaos will ensue if the Court issues the mandate, only to put the injunction back in place later if the unions prevail on their rehearing petition. See id. at 8.

c. The government's reliance on ongoing negotiations at several agencies (Motion at 5) is likewise misplaced. The parties there already have ground rules agreements that govern their negotiations. As the government concedes, those ground rules include either an agreed-upon duration for the parties' negotiations or a bargaining timeline imposed by the Federal Service Impasses Panel (FSIP). Motion at 7. The parties there, moreover, have exchanged various bargaining proposals and agreed on certain contract articles or provisions. And they may, if necessary, extend their bargaining timelines by agreement. See 5 U.S.C. § 7119(c)(5)(C).

Allowing this Court's ordinary appellate process to proceed, therefore, will not prejudice the government as it claims, let alone cause it irreparable harm. It will merely provide the opportunity for those ongoing negotiations to continue in good faith while avoiding the severe

disruption that would occur if, for example, the mandate were to be issued and then later recalled. The government also fails to identify anything that would prevent an agency, assuming as the government does that the parties were to reach impasse, from making a request in an appropriate instance that the FSIP withhold final action until issuance of this Court's mandate.

d. To advance its claim that the status quo is somehow causing disarray, the government mischaracterizes the district court's order in multiple ways. It claims, for example, that the injunction bars agencies from "keeping official-time usage within reasonable limits." Id. at 6. This is incorrect. Agencies and unions are absolutely free (and have been for more than 40 years) to negotiate appropriate and "reasonable" limits on official time, except for certain narrow exceptions. 5 U.S.C. § 7131(d) (agencies and unions shall agree on official time that is "reasonable, necessary and in the public interest").[5] What the injunction does is bar the President from mandating a per se limit on official time. It is Executive Order 13837 which keeps agencies from

[5] For example, official time is categorically not permitted for internal union business. 5 U.S.C. § 7131(b). The Executive Orders do not change this prohibition.

using their own judgment to negotiate "reasonable" limits. AFGE v. Trump, 318 F. Supp. 3d at 428 (effect of Executive Order is to "shift[] the determination" of what constitutes reasonable amounts of official time "away from both parties") (emphasis in original). No irreparable harm can result from allowing agencies and unions to continue their decades-old practice of negotiating reasonable limits on official time.

The government also erroneously claims that the injunction prohibits agency officials from "requesting to exchange written proposals." Motion at 6. The district court did no such thing. Section 5(e) of Executive Order 13836 (83 Fed. Reg. 25335) requires government agencies to "eliminate" any "bargaining approach other than the exchange of written proposals," meaning that section 5(e) itself bans non-written approaches to bargaining. Thus, by striking down section 5(e), the district court did not ban written proposals in collective bargaining. It merely rejected the Executive Orders' requirement to conduct collective bargaining negotiations entirely on paper. AFGE v. Trump, 318 F. Supp. 3d at 432. A benign obligation to engage in face-to-face meetings with employee representatives cannot cause such

immediate and irreparable harm to warrant an immediate lifting of the injunction.

The government also claims that agency officials are, under the injunction, prohibited from refusing to bargain over "permissive" subjects. Motion at 6. Again, the district court's order does no such thing. By striking section 6 of Executive Order 13836, the district court merely held that the statute does not permit the President to declare that agencies must decline to negotiate over permissive subjects. AFGE v. Trump, 318 F. Supp. 3d at 424. Nothing in the decision below suggests that agencies must (or may not decline to) negotiate over permissive subjects. Under the injunction, agencies continue to be free to decide whether—or not—to negotiate over permissive subjects on a case by case basis.

3. This litigation is of significant consequence to federal sector unions and the employees they represent. The government makes no showing, however, that the general public is unusually affected by the injunction. This is not a case involving the military or national security. Cf. Doe 2 v. Shanahan, No. 18-5257 (D.C. Cir. March 26, 2019) (mandate issued in case involving military's policy on service by

transgender individuals).[6] The injunction does not alter agencies' ability to hire and fire employees, or to discipline employees for misconduct or poor performance. It does not bar agencies from engaging in collective bargaining. It merely requires agencies to negotiate with an open mind consistent with statutory civil service requirements. The government does not explain how requiring agencies to negotiate with an open mind, as they have been statutorily required to do for forty years, adversely affects the public.

Contrary to the government's presumptuous claim that the unions will be "help[ed]" and will not be prejudiced by expedited issuance of the mandate, appellees will be harmed. Motion at 7. Appellees will lose the benefit of the orderly appellate process provided by this Court's rules.

[6] In addition to involving the military, Doe 2 (the only example relied upon by the government in support of immediate issuance of the mandate) is starkly different from this case in two additional ways. The Court had previously vacated the injunction in Doe 2 but the district court nonetheless kept the injunction in place. See Government's Emergency Motion at 1 (March 20, 2019), Doe 2 v. Shanahan, No. 18-5257 (D.C. Cir.). Issuance of the mandate was therefore needed to effectuate the Court's vacatur order. In addition, consistency among federal courts was at issue (unlike here) because the Supreme Court had two months previously stayed materially identical injunctions from another circuit. Id.

And the government's suggestion that, if the mandate is issued, appellees can seek dispute resolution that much more quickly before the FLRA is a hollow one. One kind of FLRA dispute resolution, the unfair labor practice (ULP) process cited previously by the government, has been unavailable for months because ULP complaints can only be issued by the FLRA's General Counsel and that position has been vacant since November 2017.

4. The government's own actions undercut its request that this Court short-circuit its normal timelines. It could have sought a stay of the injunction from the district court anytime in the last 11 months but apparently felt no compelling reason to do so. It waited more than a month to file its appeal in this case; and it waited seven days to file the instant motion. In light of this demonstrated lack of urgency, the government cannot credibly demand that the Court speed its processes up and order immediate relief.

5. The government also argues that it is "exceedingly unlikely" that the unions will prevail on any rehearing petition. Motion at 8. The unions respectfully and strongly disagree. Their rehearing petition will show that the panel's jurisdictional ruling ignored precedent from

this Court as well as the nature of the unions' claims that the President has illegally vitiated a statutory scheme. But even if the government is correct about the unions' likelihood of success on rehearing, that counsels against this Court expending the resources to act on the government's motion. The injunction would dissolve shortly after the denial of rehearing that the government insists is forthcoming. There will not be an "indefinite" delay. See Motion at 5. There will only be the time frame fully authorized by the Court's own rules for resolving appeals and rehearings.

6. The government refers to the Orders as setting "presumptively reasonable goals" and "lawful . . . directives." Motion at 3. The only court to address the merits of the Executive Orders, however, has found them unlawful. AFGE v. Trump, 318 F. Supp. 3d 370. The government's request serves to expedite implementation of Orders the substance of which has been found to be contrary to Congress's duly enacted civil service system.

For all these reasons, the government has failed to show any "good cause" why this Court should deviate from its standard and orderly appellate process.

C. The Government's Alternative Request for a Stay of Injunction Should Be Denied.

The government argues in the alternative that this Court, rather than the district court, should stay the district court's injunction pending issuance of the mandate. Motion at 9. The Government's request does not comply with this Court's rules, nor does it meet the "stringent" standards for such a stay. See Am. Fed'n of Teachers v. Wash. Teacher's Union Local #6, 1994 U.S. App. LEXIS 24007 (D.C. Cir. June 13, 1994).

Appellate rules require that a request for a stay of injunction should ordinarily be made to the district court. F.R.A.P. Rule 8(a). This request can only be made to this Court if such a motion to the district court would be "impracticable" or was already made and denied. Id. 8(a)(2). The government makes no showing that it would have been "impracticable" to request a stay from the district court. The government also did not comply with the rule's requirement that any stay motion to this Court include affidavits or other sworn statements. Id. The government repeatedly says that "[w]e are informed" about ongoing negotiations but offers no sworn support of any kind.

The government also does not explain its own delay in seeking this relief. Motions to stay injunctions should be made promptly, and "usually no later than 30 days after docketing." D.C. Circuit Handbook of Practice and Internal Procedures (Dec. 1, 2018) at 32. Here, the government has waited 11 months before seeking this relief. This Court should not countenance such flouting of its own rules and should deny the government's alternative request for a stay.

CONCLUSION

For these reasons, the government's Motion to Expedite Issuance of Mandate, or to Stay Injunction Pending Issuance of Mandate should be denied.

Respectfully submitted,

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August 2, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the typeface and type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 3075 words, excluding those words exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I certify that, on August 2, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the appellate CM/ECF system. I further certify that the foregoing document is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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