IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY, and
FEDERAL SERVICE IMPASSES PANEL,
Respondents.

MOTION FOR A STAY PENDING REVIEW

The Association of Administrative Law Judges ("Union"), a certified federal sector labor union, moves this Honorable Court under Rule 18(a)(2) of the Federal Rules of Appellate Procedure for a stay of all proceedings regarding a labor dispute before the Federal Service Impasses Panel ("FSIP") between the Union and the Social Security Administration ("SSA") pending review of this Court of the Petition for Review filed contemporaneously.

In support of this Motion, the Union asserts the following:

A. FACTS

1) For a total of seven weeks between March 2019 to June 2019, the SSA and the Union engaged in term collective bargaining negotiations for a successor collective bargaining agreement.
2) On June 28, 2019, Federal Mediation and Conciliation Service Commissioner Randall J. Mayhew certified the negotiations to be at impasse. (Exhibit 1).
3) Approximately four months later, on October 2, 2019, the SSA requested assistance of the FSIP with the issues certified at impasse. (Exhibit 2).
4) On October 18, 2019, the Union objected to the FSIP asserting jurisdiction on the grounds that the FSIP is not constitutionally constituted, and is thus a nullity incapable of legally providing the assistance requested. The objection set forth the reason for granting the relief requested and the facts relied upon. Additionally, the Union submitted evidence to support the facts relied upon in its motion. (Exhibit 3) (attachments omitted).
5) On November 14, 2019, the Union filed a supplemental opposition to the FSIP asserting jurisdiction over the labor dispute, renewing its objections and asserting additional grounds for the FSIP's lack of jurisdiction. (Exhibit 4).

6) On January 9, 2020, the Union received an email from Merritt Weinstein, an Attorney Advisor with the FSIP, advising that the FSIP was asserting jurisdiction over the labor dispute. The FSIP did not formally rule on any of the AALJ's jurisdictional oppositions. (Exhibit 5).

7) On January 10, 2020, the Union filed a Motion with the Federal Labor Relations Authority ("Authority") requesting it stay the Union and SSA's proceedings before the FSIP and enjoin the FSIP from continuing to assert jurisdiction on the basis that the FSIP was unconstitutionally constituted. The substantive constitutional issue was squarely before the Authority, as the Union "urge[d]" an "objection that the Panel members are not constitutionally appointed as they are principal officers who have not been confirmed by the Senate" and requested that the Authority rule on it. The motion set forth the reason for granting the relief requested, the facts relied upon, as well as evidence to support the facts relied upon in the motion. (Exhibit 6) (attachments omitted).

8) On January 13, 2020, the Union requested that the Executive Director of the FSIP stay FSIP from taking any further actions in the case until the Authority ruled on its Motion for Stay. Neither the Executive Director nor the FISP responded. (Exhibit 7).

9) Instead, on January 16, 2020, the FSIP advised the Union that the FSIP will retain jurisdiction over it despite the Motion for a Stay filed with the Authority and required the AALJ to submit responsive documents to it under deadline. (Exhibit 8).

10) On January 17, 2020, the Union filed an Amended Motion for a Stay with the Authority informing it of the FSIP's continued action in the case and the need for issuance of a temporary stay or an immediate ruling. To date, the Union has not received a response from the Authority on either Motion to Stay. (Exhibit 9) (attachments omitted). [1]

11) On January 17, 2020, the Union submitted under protest the document ordered by the FSIP on January 16, 2020, and again asserted the FSIP's lack of jurisdiction.

12) On January 24, 2020, the FSIP issued a formal procedural determination letter to the Union and SSA officially asserting jurisdiction over eight of the nine articles certified at impasse. The letter did not address any of the jurisdictional arguments raised in opposition by the Union, nor did it address the Union's

[1] On January 29, 2020, the SSA filed its "Agency's Motion for Leave to File an Opposition to the Union's Motion for Stay Enjoining the Federal Service Impasses Panel from Asserting Jurisdiction."

requested stay. Instead, the FSIP ordered the Union to present its case before the Panel by February 7, 2020. (Exhibit 10).

13) The Union properly moved both the FSIP and the Authority for relief. The FSIP denied the Union's multiple constitutional objections to its exercise of jurisdiction over the Union, as well as its request for a stay by nonetheless asserting jurisdiction. The Authority failed even to respond to any of the relief requested in the Union's multiple requests for a stay or a ruling on the merits on the constitutional claim.

14) The Authority had the power to grant the requested stay. *See* 5 U.S.C. § 7101(b); 5 U.S.C. § 7105(a)(2)(I)*; American Federation of State, County, Municipal Employees and U.S. Department of Justice*, 59 FLRA No. 143 (2004); *National Treasury Employees Union and Federal Deposit Insurance Corporation*, 32 FLRA 1131 (1988). However, by ignoring the Union's requests, the Authority constructively denied the Union's motions.

15) There are no other avenues of administrative redress for this significant constitutional issue. The Union has exhausted its administrative remedies.

16) Pursuant to Local Rule 27(a) the undersigned contacted Noah Peters, Esq., the Solicitor of the FLRA, and informed him of the intended filing of this Motion. Mr. Peters responded that neither the FLRA nor the FSIP consented to this Motion.

B. STANDARD OF REVIEW

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (citation and internal quotations omitted). Rather, whether a stay is warranted is subject to the discretion of the court guided by traditional principles of equity. *Inland Steel Co. v. United States*, 306 U.S. 153, 156 (1939); *Deckert v. Independence Shares Corporation*, 311 U.S. 282, 290 (1940). The Court considers four factors in determining whether to issue a stay:

> whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434-35 (citation and internal quotations omitted). The moving party bears the burden of showing that the circumstances justify the issuance of a stay. *Id.* at 433-34. The moving party must satisfy all four requirements of the four-factor test. *See Cantley v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 771 F.3d 201, 207 (4th Cir. 2014) (citation omitted). However, the first two factors are the most important. *Nken*, 556 U.S. at 434. After a petitioner satisfies the first two factors, the stay inquiry calls for "assessing harm to the opposing party and weighing the public interest." *Id.* at 435. When, as in this instance, the Government is the opposing party, these factors merge. *Id.*

The four factors should be balanced on a sliding scale, and a party can compensate for a lesser showing on one factor by making a very strong showing on another factor. *CS X Transp., Inc. v. Williams*, 365 U.S. App. D.C. 331, 406 F.3d 667 (D.C. Cir. 2005) (citing *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C.Cir.1995). "A stay may be justified, for example, where there is a particularly strong likelihood of success on the merits, even if there is a relatively slight showing of irreparable injury." *CityFed Fin. Corp.*, 58 F.3d at 747.

C. REASONS FOR GRANTING A STAY

The Union moved for a stay with both the FLRA and the FSIP. Neither responded. *See* F.R.A.P. 18(a)(2)(A)(ii) (agency failure to grant relief requested). The January 24, 2020 decision of the FSIP is the final order on its determination of jurisdiction. The Authority failed to respond to the Union's request for a stay. As a result, it has also failed to afford the Union the relief requested. Therefore, the Authority's failure to act is a constructive denial.[2]

[2] 5 U.S.C. § 7123 (a) provides that final orders of the Authority are reviewable by the U.S. Court of Appeals. Final Order is not defined in the FLRA Statute, but "order" is defined in the Administrative Procedure Act. Order means "the whole or part of a final disposition whether affirmative, negative, injunctive, or declaratory in form of an agency in a matter other than rule-making but including licensing[.]" 5 U.S.C. § 551(6).

1. The Union is likely to succeed on the merits.

In order to succeed on this prong of the test, the plaintiff must at least present a *prima facie* case to satisfy this factor. *FTC v. Food Town Stores, Inc*., 539 F.2d 1339 (4th Cir. 1976).

The Union raises serious constitutional concerns regarding the composition of the FSIP itself, as well as the proper constitutional appointment of each individual FSIP member. Specifically, the Union alleges the statute by which the FSIP members are appointed unconstitutionally confers plenary power upon the President to appoint principal officers in violation of Article 2, Section 2, Clause 2 of the U.S. Constitution ("Appointments Clause").

Pursuant to prevailing Supreme Court case law, the Chair and all the members of the FSIP are principal officers who must be appointed in a manner consistent with the Appointments Clause. *See Lucia v. SEC*, 585 U.S. __, 138 S. Ct. 2044, 2056 (2018); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 882 (1991). Principal officers must be nominated by the President and confirmed by the Senate. However, the statute governing the appointment of FSIP panel members does not require nomination and Senate confirmation, but rather allows the President alone to appoint. *See* 5 U.S.C § 7119.

Using the unadorned "significant authority" test the Supreme Court found special trial court judges of the Tax Court to be inferior officers because their

positions were established by law with duties, salary, and manner of appointment all specified by statute, and they issued final agency decisions. *Freytag*, 501 U.S. at 880. Further, they took testimony, concluded trials, ruled on admissibility of evidence, and had the power to enforce compliance with discovery. *Id*. at 881.

All of the Supreme Court's findings regarding the special trial judges in *Freytag* are mirrored within the duties of the panel members of the FSIP. *See* 5 U.S.C § 7119. However, unlike the special trial judges in *Freytag*, the FSIP's decisions are final, binding (unless the parties mutually agree otherwise), and non-reviewable or appealable, absent extraordinary circumstances as defined by *Leedom v. Kyne*, 358 U.S. 184 (1958) because Congress expressly precluded direct review of FSIP decisions. *See Leedom v. Kyne*, 358 U.S. 184 (1958); *Council of Prison Locals v. Brewer*, 735 F.2d 1497 (D.C. Cir. 1984). *Leedom* provides an extremely limited review that is narrow in scope, rarely used, and applies only where an agency has exceeded its delegated powers or facially violated a statute.

See Nyunt v. Chairman, Board of Governors, 589 F.3d. 445, 449 (D.C. Cir. 2009); *Lundeen v. Mineta*, 291 F.3d 300, 304-305 (5th Cir. 2002); *Russell v. NMB*, 714 F.2d 1332, 1340 (5th Cir. 1983).

Furthermore, no principal officer has independent statutory authority to review the decisions of the FSIP before they are issued.[3] The FSIP also has independent and exclusive authority, without oversight, under the statute to promulgate policies, rules and regulations in order to carry out the provisions of the statute applicable to the FSIP. *See* 5 U.S.C. § 7134.

Courts have held that individuals who exercise such significant deference, authority, and independence are principal vs. inferior officers and must be appointed in a manner consistent with the Appointments Clause. S*ee Buckley v. Valeo*, 424 U.S. 1 (1976) (holding the eight members of the Federal Election Commission were principal officers); *Association of American Railroads v. U.S. Department of*

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[3] Identical constitutional claims are pending before the U.S. District Court for the District of Columbia in *American Federation of Government Employees vs. Federal Service Impasses Panel*, Case Number: 1:19cv1934. In direct response to the constitutional issues raised in the *AFGE* suit, on November 12, 2019, the President attempted to delegate his statutory authority to remove FSIP members to the Authority via a Presidential memorandum. The issuance of the memorandum was an attempt to cure the constitutional defects regarding the FSIP's composition. However, by statute Congress expressly vested removal authority of FSIP members solely in the President. The Presidential memorandum also attempts to vest in the Authority the ability to review decisions of the Panel in order to ascertain whether they are consistent with 5 U.S.C. §7101(b). The power of the Authority to conduct such review is doubtful as it directly conflicts with the statute and well established case law that decisions of the Panel are final and non-reviewable. *See* 5 U.S.C. § 7119 (c)(5)(C); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1500-01 (D.C. Cir. 1984). Ultimately, Presidential memoranda are not law and cannot conflict with a statute or established case law.

Transportation, 821 F.3d 19, 39 (D.C. Cir. 2016) (holding railroad passenger rate arbitrators are principal officers because their decisions were non-reviewable); *Intercollegiate Broad Systems, Inc. v. Copyright Royalty Board*, 684 F.3d 1332, 1336-40 (D.C. Cir. 2012) (holding Copyright Royalty Board members were principal officers because they exercised significant discretion and issued final non-reviewable decisions).

The Appointments Clause clearly and precisely sets forth the exclusive manner in which a principal officer may be constitutionally appointed, by nomination of the President, with the advice and consent of the Senate. Therefore, the Appointments Clause confers plenary power to the President to nominate principal officers and plenary power to the Senate to reject or confirm the President's nomination.

The Framers anticipated that the President would be more vulnerable to interest-group pressure and favoritism than would a collective body elected by the people. *Edmond*, 520 U.S. at 659. As such, the requirement of Senate confirmation for principal officers served to curb Executive abuses of the appointment power, promote judicious choices in filling offices, and protect the public interest. *See id*. The FSIP panel members were not appointed in a manner consistent with the Appointments Clause. In the absence of proper appointments the FSIP panel

members lack the authority to discharge their duties. Indeed, from a constitutional perspective, they are not even panel members. There is no panel.

The Union has more than established a *prima facie* case, and is likely to prevail on the merits because the statutory scheme for the creation of the FSIP panel members must yield to the Appointments Clause.

2. Without a stay, the Union will suffer irreparable injury.

The second factor is that the plaintiff is likely to suffer irreparable injury in the absence of a stay. "Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant." *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 22 (2008). A mere possibility of irreparable injury is simply not enough. *Nken*, 556 U.S. at 434-35.

Without a stay, on February 7, 2020, the Union will be forced to present its case, without recourse, before an unconstitutionally constituted FSIP. The Union will have no choice but to divulge its final litigation strategy and legal positions regarding the disputed articles of the labor contract at the demand of an unlawful body. Secondly, without a stay, the unconstitutionally constituted FSIP will be unfettered in issuing a final binding decision with regard to the Union's labor dispute with the SSA. This is particularly egregious because final decisions of the FSIP are not subject to direct judicial review absent extraordinary circumstances as defined in *Leedom v. Kyne*, 358 U.S. 184 (1958). Thus, in the absence of a stay, the FSIP's exercise of

unconstitutional jurisdiction will be virtually irreversible. Given this threat, the spectre of an unconstitutionally composed government entity deciding labor disputes across the federal sector suggests that this issue would be capable of repetition and evading review. Therefore, the Panel's unlawful exercise of jurisdiction will wholly deprive the Union of any meaningful relief and result in irreparable injury.

3. A stay is in the public interest and will not harm the Government.

When deciding whether to grant a stay, the court must first determine whether the plaintiff has made a strong showing of irreparable harm if the stay is denied; if such a showing is made, the court must then balance the likelihood of harm to the plaintiff against the likelihood of harm to the defendant. *See Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 859 (4th Cir. 2001)[4]; *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). If the balance of the hardships "tips decidedly in favor of the plaintiff," *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991), then typically it will "be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate

[4] The tests for granting a stay versus injunction are virtually the same. *See A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1006 (4th Cir. 1986).

investigation." *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F2d 189, 195 (4th Cir. 1977) (internal quotations and citations omitted).

Here, the Union raises serious constitutional issues concerning the make up of the FSIP, and its lawful existence to carry out its statutory duties. However, to date these serious constitutional issues have wholly been ignored by both FSIP and the Authority. Based on the constructive denial of the Authority, the Union is being forced to submit to an unconstitutionally constituted FSIP, and present its case on the disputed articles at impasse on February 7, 2020. As a result, the Union has more than made a "clear showing" that it will suffer irreparable injury and is entitled to a stay. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

In contrast, the only harm to the Authority - as well as FSIP - is delaying the continued exercise of an unconstitutional exertion of jurisdiction over the dispute between the Union and SSA. The balance of harm between the Union and the Authority and FSIP more than "tips decidedly in favor of the [Union]." *See Rum Creek Coal Sales*, 926 F.2d at 359. Furthermore, since the Union and SSA were declared at impasse in June 2019, they have maintained the *status quo* in their bargaining dispute. In fact, the SSA did not even attempt to invoke the jurisdiction of the FSIP for almost four months after impasse was declared. In the meantime, the SSA continues operations as normal, serving the public. The entry of a stay by this Court will additionally not harm the SSA in the least.

Nor would a stay harm the FLRA or the FSIP. The public has an interest as well as an expectation that the business of the government will be conducted in a manner comporting with the Constitution. In 5 U.S.C. § 7101(a) Congress stated that:

> (1) experience in both private and public employment indicates that 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-
> (A) safeguards the public interest,
> (B) contributes to the effective conduct of public business, and
> (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment…

Thus, in 5 U.S.C. §7101(b) Congress provided that these provisions "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." *See Assn. of Admin Law Judges v. FLRA*, 397 F.3d 957, 959 (D.C. Cir. 2005) ("[T]he Congress has specifically directed that the provisions of [§ 1701] should be interpreted in a manner consistent with the requirement of an effective and efficient Government.") (internal quotations omitted) (denying the Union's petition for review because the Authority applied a *de minimis* exception to a "truly insignificant change in the ALJ's conditions of employment").

Thus, the unlawfulness of the appointments under 5 U.S.C § 7119 itself is against the public interest because there can be no public interest in anyone being forced to participate unwillingly in an unconstitutional process. Such a situation

raises due process concerns. Ultimately, a stay is in the public interest because the question of the constitutional legitimacy of the FSIP goes to the core of ordinary federal sector labor/management business.

D. CONCLUSION AND PRAYER FOR RELIEF

This Court should issue a stay of all proceedings regarding the labor dispute before the Federal Service Impasses Panel between the AALJ and the Social Security Administration pending review by this Court of the Petition for Review filed contemporaneously. The Union's risk of injury meets the four-factor test set out in *Nken*. 556 U.S. at 433-34. The Union has satisfied all four *Nken* factors as required by *Cantley*. *Cantley*, 771 F.3d at 207. Because the Union has nowhere else to turn for relief, this Court should issue the stay that the Union requests.

The AALJ further requests that no bond or security be required pursuant to F.R.A.P 18(b).

We certify that the length of this Motion, not including exhibits, according to MS Word is 3627 words.

Respectfully submitted, this the 30th day of January, 2020.

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