64 FLRA No. 18

NATIONAL TREASURY EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C.
(Agency)

0-AR-4266

DECISION

September 29, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Joshua M. Javits filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The grievance alleges that the Agency violated § 7116(a)(1) and (5) of the Statute and the parties' national agreement by implementing changes in promotion procedures without first bargaining in accordance with the law. The grievance alleges further that the Agency failed to comply with 5 C.F.R. Parts 300 and 335 prior to implementing the changes. The Arbitrator denied the Union's grievance in its entirety.

For the reasons that follow, we deny the exceptions.

II. Background and Arbitrator's Award

Article 13, Section 5 of the parties' national agreement sets out the following three factors for which the Agency is to assign points when scoring applicants for promotions: (1) the applicant's current performance appraisal; (2) the applicant's potential to fill the position for which he/she is applying; and (3) awards that the applicant has received. Award at 2. The Agency uses the scores to determine which applicants are to be included on the "Best Qualified" list that is presented to the selecting official for consideration. *Id*. at 3.

When bargaining concluded on the national agreement, Article 13, Section 5 was rolled over from the previous agreement. *Id*. at 3. Subsequently, during Agency-head review, the Department of the Treasury disapproved three portions of Section 5, pertaining to assigning points for incentive awards. *Id*. The Union filed a negotiability appeal with the Authority challenging the disapproval.

The Authority dismissed the Union's negotiability appeal. *NTEU*, 61 FLRA 554 (2006) (*NTEU*). In particular, the Authority concluded that the three disapproved portions were contrary to 5 C.F.R. Part 300, including § 300.103. [2] 61 FLRA at 557. Specifically, the Authority held that the disapproved portions assigned points to various types of performance awards without regard to the demands of specific occupations, and that they were not designed to apply to a particular position or group of positions. *Id.*

Following the Authority's decision, the Agency determined that it was necessary to revise the portions of Article 13, Section 5 concerning consideration of awards. To that end, on June 6, 2006, the Agency offered the Union a proposal that awards received in the previous three years would be credited unless it is determined by a subject matter expert that the awards are not related to the position. Award at 6-7. The Agency informed the Union that if no agreement was reached by June 19, 2006, then the proposal would be implemented and the parties could engage in post-implementation impact and implementation bargaining. *Id*. at 7. When the parties did not reach agreement by June 19, 2006, the Agency unilaterally implemented the proposal. *Id*. at 7-9. The Union then filed a grievance alleging that the Agency's implementation constituted both an unfair

1. Member DuBester did not participate in this decision.

2. Section 300.103 provides, in pertinent part:

> (a) *Job analysis.* Each employment practice of the Federal Government generally, and of individual agencies, shall be based on a job analysis to identify:
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> (1) The basic duties and responsibilities;
>
> (2) The knowledges, skills, and abilities required to perform the duties and responsibilities; and
>
> (3) The factors that are important in evaluating candidates. . . .
>
> (b) *Relevance.* (1) There shall be a rational relationship between performance in the position to be filled . . . and the employment practice used. The demonstration of rational relationship shall include a showing that the employment practice was professionally developed. . . .

labor practice (ULP) in violation of § 7116(a)(1) and (5) of the Statute and a prohibited personnel practice because the proposal was inconsistent with 5 C.F.R. §§ 300.103 and 335.103(b)(3) [3] . When the grievance was unresolved, it was submitted to arbitration. The Arbitrator framed the substantive issues [4] as follows:

> 1. Did the Agency violate § 7116(a)(1) and (5) and corresponding provisions of the national agreement by implementing changes in promotion procedures without first bargaining in accordance with the law?
>
> 2. Did the Agency commit prohibited personnel practices and violate corresponding provisions of the national agreement by failing to comply with 5 C.F.R. Parts 330 and/or 335 prior to implementing changes in promotion procedures?

Id. at 2.

The Arbitrator found it undisputed that the Agency unilaterally implemented revised promotion procedures before bargaining was completed. *Id*. at 39. The Arbitrator also found that the revised procedures constituted a change in working conditions. He acknowledged that an agency is generally required to complete bargaining before implementing changes to working conditions. *Id*. However, he found that Authority precedent permits an agency to implement changes to working conditions unilaterally when doing so is necessary for the functioning of the agency. *Id.*, citing *United States Dep't of Justice, INS*, 55 FLRA 892, 904 (1999) (*Border Patrol*).

The Arbitrator found, "after carefully and extensively reviewing the voluminous materials submitted by the parties on this issue," that the Agency successfully established a "necessary functioning" defense. Award at 41. In this connection, the Arbitrator found convincing the Agency's explanation that it needed to fill mission-critical positions promptly in order to prevent operations from coming to a "screeching halt." *Id.* at 40. He also found "credible and compelling" the testimony of the Agency's witness that the Agency needed to act expeditiously in changing the promotion procedures because it was undertaking a "wave hiring" program requiring the recruitment of hundreds of new employees. *Id*. at 41. In addition, he considered testimony by the Agency's witness that the Agency could not sustain indefinitely the temporary freeze that it had imposed on promotions as a result of the Authority's decision. *Id*. at 41-42. The Arbitrator also determined that the circumstances requiring the Agency to revise its promotion procedures, *i.e.*, the Department of Treasury's disapproval and the Authority's decision, were both unexpected and beyond the Agency's control. *Id*. at 42-43.

In addition, the Arbitrator found that the revised procedures comply with 5 C.F.R. §§ 300.103 and 335.103(b)(3). Specifically, the Arbitrator rejected the Union's interpretation of these regulations as requiring the Agency to conduct new job analyses of each position to be filled. *Id*. at 44. Based on his interpretation of *NTEU* and on the "convincing and compelling" testimony of the Agency's expert on job analyses, the Arbitrator concluded that the Agency had already conducted adequate job analyses when the positions were created. *Id*. at 44-45. The Arbitrator also found convincing the Agency expert's testimony that consideration of awards is permissible when a subject matter expert has discretion to determine whether an incentive award is job related. *Id.* at 46. Accordingly, the Arbitrator denied the grievance. *Id*.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the "necessary functioning" exception applies only after a dispute has been submitted to the Federal Service Impasses Panel (FSIP). Exceptions at 4-5. In addition, the Union contends that the "necessary functioning" exception is contrary to the Statute, which, according to the Union, relieves an agency of the obligation to bargain in advance of implementation only in an "emergency," within the meaning of § 7106(a)(2)(D). *Id.* at 5-9. In this regard, the Union claims that the Statute was intended to be identical to the National Labor Relations Act (NLRA), and that, by including the "emergency" provision in the Statute but not in the NLRA, Congress intended to permit unilateral implementation under the Statute only in emergencies. *Id*. at 5-7. The Union also claims both that the Agency failed to demonstrate an emergency and that, even if the "necessary functioning" exception applies, the Arbitrator erred in determining that the requirements of the exception were satisfied. *Id*. at 11-14.

Moreover, the Union argues that the award is contrary to law because the Arbitrator failed to find that the

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3. Section 335.103(b)(3) provides, in pertinent part:

> (3) *Requirement 3.*
>
> Methods of evaluation for promotion and placement . . . must be consistent with instructions in part 300, subpart A, of this chapter. Due weight shall be given to performance appraisals and incentive awards.

4. The Arbitrator also addressed the issue of whether the grievance was arbitrable, and found that it was. As there are no exceptions to this finding, we do not address it further.

Agency engaged in a prohibited personnel practice by implementing procedures that violate 5 C.F.R. §§ 300.103 and 335.103(b)(3). *Id*. at 14-24. The Union argues that the term "job analysis" in 5 C.F.R. § 300.103(a) requires more than the existence of a position description and critical elements for a position. *Id*. at 18-19. The Union contends that without creating a new job analysis for each vacant position, the Agency cannot, as required by § 300.103(a), identify the "knowledge, skills[,] and abilities . . . required to perform the duties and responsibilities" of the position or the "factors that are important in evaluating candidates[.]" *Id*. at 23. In this regard, the Union asserts that the Authority previously has sustained arbitral findings that the Agency committed a prohibited personnel practice in its administration of Article 13, Section 5 by failing to conduct the job analyses required by § 300.103(a), *see id*. at 23-24, citing *United States Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 226 (2005) (*IRS-D.C.*); and *United States Dep't of the Treasury, IRS, Houston, Tex.*, 60 FLRA 934 (2005) (*IRS-Houston*).

B. Agency's Opposition

The Agency contends that the Arbitrator correctly applied the "necessary functioning" exception, Opposition at 3-10, and disagrees with the Union's contention that the Authority recognizes "necessary functioning" as a defense only after a bargaining dispute has reached the FSIP. *Id.* at 3-5. As for the Union's assertion that the "necessary functioning" defense is not an exception to the duty to bargain, the Agency contends that the assertion is based on a misreading of § 7106(a)(2)(D), and that § 7106(a)(2)(D) does not address unilateral implementation. *Id.* at 6.

The Agency argues further that it satisfied the requirements of the "necessary functioning" exception. *Id.* at 8-10. In this connection, the Agency notes that the Agency official most familiar with the promotion procedures at issue presented credible testimony that supported a finding of necessity, and that, based on this testimony, the Arbitrator found that the circumstances requiring the Agency to correct its promotion procedures were beyond the Agency's control and were not foreseeable. *Id*. at 8-9. On this basis, the Agency distinguishes this case from those in which the Authority found that requirements of the "necessary functioning" exception were not met. *Id*. at 9-10.

Finally, the Agency contends that the Arbitrator correctly concluded that the revised promotion procedures comply with applicable regulations, and that the Authority should defer to the Arbitrator's interpretation of those regulations. *Id*. at 10-15. According to the Agency, the Union's reliance on *IRS-D.C*. is misplaced because the arbitrator in that case had not reached the job analysis issue.

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See United States Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The Agency did not commit a ULP.

The Union alleges that the Agency committed a ULP when it implemented changes in its promotion procedures before completing bargaining. It is long established that an agency "must meet its obligation to negotiate prior to making changes in established conditions of employment[.]" *Dep't of the Air Force, Scott Air Force Base, Ill.*, 5 FLRA 9, 11 (1981). However, an agency may make unilateral changes in matters affecting employment if the changes are necessary to the functioning of the agency. That is, "necessary functioning" is a defense to an alleged unlawful unilateral implementation. *Border Patrol*, 55 FLRA at 904. An agency asserting the defense has the burden to establish "that its actions were in fact consistent with the necessary functioning of the agency, such that a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission." *Id*.

Citing a series of Authority decisions, the Union asserts that the Authority recognizes "necessary functioning" as a defense only after a bargaining dispute has reached the FSIP. *See* Exceptions at 4-5. However, no Authority decision, including those that the Union cites, states that proposition. *See, e.g., Border Patrol*; *Def. Logistics Agency, Def. Indus. Plant Equip. Ctr., Memphis, Tenn.*, 44 FLRA 599, 616 (1992). Instead, the decisions stand only for the proposition that if parties have bargained to impasse and have enlisted the services of the FSIP, then the status quo must be maintained unless it can be determined that immediate implementation is necessary for the functioning of the agency. This precedent does not support a conclusion that the Agency is precluded from asserting the "necessary functioning"

defense merely because the instant dispute was never taken to the FSIP.

The Union also asserts that the Statute relieves an agency of the obligation to complete bargaining before implementing changes in working conditions only in an "emergency" under § 7106(a)(2)(D). Exceptions at 6-9. However, the fact that an agency has a right under § 7106(a)(2)(D) to act in an emergency does not state or imply that an agency may not implement changes in other situations. In this regard, § 7106(a)(2)(D) makes no mention of such changes.

The Union claims that even if the "necessary functioning" exception applies, the Arbitrator erred in finding that the Agency satisfied its requirements here. The Authority has held, in this regard, that an agency asserting the defense has the burden to establish "with evidence, that its actions were in fact consistent with the necessary functioning of the agency, such that a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission." *Border Patrol*, 55 FLRA at 904. In applying the exception, the Authority has found that whether its requirements are satisfied depends primarily on whether the agency produces adequate factual support for its assertions of necessity. *See, e.g., United States Dep't of Homeland Sec., United States Customs and Border Prot.*, 62 FLRA 263, 266 (2007) (burden not met when general assertions that officer and national safety required immediate implementation of uniform grooming standards for officers not supported by factual findings regarding public response or interference with mission accomplishment); *Border Patrol*, *supra* (burden not met by policy arguments in lieu of factual evidence that delayed implementation of non-deadly force policy would have impeded ability to carry out agency's mission).

The foregoing precedent demonstrates that determinations as to whether an agency has satisfied the requirements of the "necessary functioning" exception are primarily, if not completely, factual. Applying that precedent here, the Arbitrator concluded that the Agency demonstrated "necessary functioning" based on his extensive factual findings. *See* Award at 40. The Arbitrator also factually distinguished this case from cases in which the Authority did not find necessity. *See id*. at 42-43. The Union has not shown that Arbitrator erred in his evaluation of the record or in his determination, based thereon, that Agency did not violate the Statute.

Accordingly, we deny this exception.

B. The Agency did not violate 5 C.F.R. Part 300.

The Union alleges that the revised promotion procedures do not comply with 5 C.F.R. Part 300 because the Agency did not conduct a detailed job analysis to validate its use of incentive awards under Article 13, Section 5. Exceptions at 17. As the Arbitrator explained, the Authority's determination in *NTEU* that the three disputed provisions at issue in that case were properly disapproved on Agency-head review did not require the Agency to perform the job analyses that the Union seeks. *See* Award at 44, citing *NTEU*, 61 FLRA at 556-57. Instead, the Authority's reasoning was that each of the now-rescinded provisions applied "without regard to the demands of specific occupations and [was] not designed to apply to a particular position or group of positions." *Id.* In this connection, the Authority found the provisions established "absolute measurement devices" for the assignment of points for incentive awards. *Id*. at 557.

The Arbitrator found that, in developing the new promotion procedures to replace the now-rescinded provisions, the Agency conducted job analyses for its positions as they were created, in the form of a position description and critical job elements. Award at 45. The Arbitrator credited the Agency expert's testimony that these job analyses met the requirements of Part 300. *Id*. The Union asserts that the Arbitrator erred in relying on the Agency expert's testimony. Exceptions at 17-19. To the extent that the Union is challenging the Arbitrator's decision to credit the Agency expert's testimony, the Authority has held that such challenges provide no basis for finding an award deficient. *See SSA, Balt., Md*., 57 FLRA 538, 542 (2001). *See also NTEU*, 61 FLRA 618, 623 (2006). Further, in determining whether an employment practice bears a rational relationship to job performance, it is unnecessary to determine whether a different practice is preferable. *Curtin v. OPM*, 846 F.2d 1373, 1378 (Fed. Cir. 1988). Thus, to the extent that the Union is asserting that a different job analysis method would have been preferable, the assertion does not demonstrate that the award is deficient.

Finally, contrary to the Union's assertions, case law does not establish that the Agency must conduct additional job analyses in order to comply with Part 300. *See* Exceptions at 19-24. *Morris v. Office of Personnel Management*, 14 M.S.P.R. 578, 580-81 (1983), is inapplicable here because it relates only to examination procedures to determine basic qualification standards for newly-created positions, not to selective factors such as award consideration. *Baxter v. OPM*, 44 M.S.P.R. 125, 131 (1990) (noncompliance with Part 300 when the Office of Personnel Management failed to link selective

factor Knowledge, Skills, and Abilities (KSAs) to position description). Likewise, as set forth above, none of the Authority decisions that the Union cites requires an agency to create additional job analyses when establishing or revising promotion procedures. *See* Exceptions at 22-24, citing, *e.g.*, *IRS-DC*, *supra* (arbitrator did not reach issue of whether a job analysis was required); *IRS-Houston*, *supra* (arbitrator found violation of Part 300 based on establishment of improper cut-off score for highly qualified list; job analysis was not an issue).

Accordingly, we deny this exception.

V. Decision

The Union's exceptions are denied.