64 FLRA No. 169

BROADCASTING BOARD OF GOVERNORS
OFFICE OF CUBA BROADCASTING
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1812
(Union)

0-AR-4585

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DECISION

June 16, 2010

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

I. Statement of the Case

This matter is before the Authority on exceptions to two awards (the merits award and the remedy award, respectively) of Arbitrator Jerome H. Ross filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the exceptions.

In the merits award, the Arbitrator found that the Agency violated its contractual obligation to bargain over the decision to move an employee to a new office. In the remedy award, the Arbitrator directed the Agency to relocate the employee to one of the offices that she had previously occupied. For the reasons that follow, we deny the exceptions.

II. Background and Arbitrator's Awards

The Union filed a grievance alleging that the Agency failed to fulfill its bargaining obligations under the parties' agreement and the Statute when it moved an employee from one room, which was subsequently converted into a studio (the studio), to another room (the newsroom). Merits Award at 1. The grievance was unresolved and submitted to arbitration. At arbitration, the Union claimed that the grievance also encompassed an allegation that the Agency similarly failed to fulfill its bargaining obligations when it subsequently moved the employee from the newsroom to yet another room (the current office). *Id.* at 6. The parties stipulated to the issues, Exceptions, Attach. 3 at 5-6 (Hr'g Tr.), which were as follows:

> Whether the Agency violated Article 26 of the [parties' agreement] and the [Statute] when it moved [the employee from the studio to the newsroom] . . . ; and if so, what is the appropriate remedy?
>
> Whether the [second] move [from the newsroom to the current office] is arbitrable. If so, whether the Agency violated Article 26 of the [parties' agreement] and the [Statute.]

Merits Award at 7.

The Arbitrator found that the two moves were "discrete acts which required the filing of separate grievances[,]" and that the Union's failure to file a timely grievance concerning the second move precluded it from arbitrating issues regarding that move. *Id.* at 14.

With regard to the first move, the Arbitrator set forth the pertinent provisions of the parties' agreement, including a provision that employees shall have at least sixty square feet of personal work space, which does not include common-use equipment, areas, and walkways.[1] *Id.* at 2. The Arbitrator also reviewed Article 26, Section 4 (Section 4) of the parties' agreement, which sets forth the Agency's contractual bargaining obligation concerning changes to employees' work space and pertinently provides:

> When a space change (e.g. . . . moving to different office space . . .) is to occur, which affects bargaining unit employees, the Agency will notify the Union and provide a

1. Specifically, Article 26, Section 2 provides, in pertinent part:

> All bargaining unit employees shall have no less than sixty (60) square feet of personal work space . . . . In those instances where overall space is insufficient to meet the standard, a deviation from this standard will be negotiated between the parties through impact and implementation bargaining. . . . Common use equipment, areas and walkways will not be included in the employee's work space.

Merits Award at 2.

> copy of the proposed floor plan and the names of the bargaining unit employees affected prior to the change. The Union shall have an opportunity to bargain before implementation on anything not specifically addressed in this Article, including, but not limited to, the move . . . , configuration of furniture, location of common use equipment and circumstances particular to an individual move. The Agency shall fulfill its bargaining obligation before implementation.

Id. at 3. The Arbitrator determined that Section 4 "unambiguously set forth the parties' rights and requirements with regard to space changes" and: required the Agency to notify the Union of a planned move; gave the Union a right to bargain; and required the Agency to "fulfill its bargaining obligation before implementation." *Id.* at 12.

The Arbitrator found that the Agency notified the Union of the impending move, and that the parties subsequently corresponded about management diagrams that showed the furniture placement in the newsroom, which the employee would share with her supervisor. *Id.* at 4-6, 12. The Arbitrator also found that the Union requested to bargain over the "configuration of furniture" in the newsroom, and that this was a negotiable subject under Section 4. *Id.* at 12. In this regard, the Arbitrator noted not only that this subject is specifically listed in Section 4, but also that the list of negotiable items set forth in Section 4 is expressly non-exhaustive. *Id.*

The Arbitrator rejected the Agency's assertion that the Union's complaints about the move were non-negotiable because they addressed the configuration of the *supervisor's* furniture, and thus did not concern a bargaining-unit employee. *Id.* at 14. In this connection, the Arbitrator stated:

> The Union's responses to management's diagrams addressed the configuration of furniture in [the newsroom] which was shared by [the employee and her supervisor]. It also focused on the location of common use equipment such as the fax machine and [a] . . . file cabinet. The evidence shows that, given the limited space indicated in the diagrams for [the newsroom], the placement of those pieces of equipment and [the supervisor's] other pieces of furniture not reflected in the diagrams could have reduced [the employee's] personal work space below 60 square feet. The Union legitimately raised these concerns under several Section 4 subjects including "circumstances particular to an individual move."

Id. (quoting parties' agreement). Having found that the Union properly initiated bargaining, the Arbitrator found that the Agency was required to either reach agreement or bargain to impasse with the Union before the Agency could implement the proposed move. *Id.* at 13. The Arbitrator found that the Agency failed to do so and, thus, violated the agreement. *Id.* at 13, 16.

The Arbitrator remanded the grievance to the parties to negotiate a remedy and retained jurisdiction in the event that the parties were unable to agree. *Id.* at 16. The Arbitrator also stated that the Agency had "failed to meet its contractual and statutory mid-term bargaining obligations in past years[,]" *id.* at 15, and ordered the Agency to post a notice to employees similar to previously ordered postings. *Id.* at 16.

When the parties were unable to agree upon a remedy, the Arbitrator issued the remedy award to redress the Agency's improper relocation of the employee from the studio to the newsroom (the first move). Before the Arbitrator, the Union sought to restore the status quo as it existed prior to the *first* move, which would require moving the employee from the current office back to the studio. Remedy Award at 2. The Agency argued that *status quo ante* (SQA) relief would be appropriate only if the Arbitrator had found the second move (from the newsroom to the current office) to be unlawful. *Id.* at 3 (citing *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982) (*FCI*)). However, in the event that the Arbitrator determined that SQA relief was appropriate, the Agency argued that restoring the status quo as it existed prior to the *second* move by returning the employee from the current office to the newsroom would be less disruptive to the Agency's mission than returning her to the studio. Remedy Award at 3.

The Arbitrator found that "the restoration of the [SQA] to the newsroom is consistent with the intent of the . . . drafters [of the parties' agreement] to restore the parties and the employee to the position they would have been in absent the violation of . . . Section 4." *Id.* at 4. The Arbitrator reasoned that because "[the newsroom] was the intermediate move in the chain of events giving rise to the grievance[,] [t]he Union's contractual rights are satisfied by a return of the employee to the newsroom." *Id.*

The Arbitrator stated that "[e]ven if the *FCI* criteria would have applied to an arbitral determination of a contract violation," he would have found an SQA remedy to be appropriate.[2] *Id.* In this regard, the Arbitrator noted that "[a]fter balancing [certain of the *FCI*] factors against the [Agency's] repeated violations of . . . Section 4[,]" returning the employee to the newsroom would still be the appropriate remedy. *Id.*

III. Positions of the Parties

A. Agency Exceptions

The Agency argues that the merits award is contrary to law because the Arbitrator "wrongly concluded that the Agency was required to reach an agreement or declare impasse" prior to implementing the proposed office move. Exceptions at 10. The Agency contends that it provided proposals to the Union and that the Union merely objected to those proposals without providing negotiable counter-proposals. *Id.* at 11-14. According to the Agency, because its bargaining obligation is "'predicated on the [U]nion's submission of negotiable proposals[,]'" the Agency "clearly satisfied its bargaining obligation under . . . [S]ection 4 . . . and [f]ederal labor law and appropriately began implementation after the submission of its last proposal." *Id.* at 12 (quoting *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003)).

In addition, the Agency asserts that the remedy award is contrary to law because, in granting SQA relief, the Arbitrator: (1) incorrectly applied the *FCI* factors; (2) erroneously relied upon past settlement agreements and past Agency violations of the parties' agreement; and (3) moved the employee back to the newsroom even though the move from the newsroom to the current office was not arbitrable.[3] Exceptions at 15-18.

The Agency also asserts that the merits award is based on a nonfact because the Arbitrator "relie[d] upon mere speculation" when he rejected the Agency's argument that the Union did not engage in bargaining because its responses to the Agency's proposals concerned supervisory conditions of employment. *Id.* at 13-14. According to the Agency, by finding that the placement of the supervisor's furniture "*could have* reduced [the employee's] personal work space below 60 square feet of space[,]" the Arbitrator erroneously relied upon a "hypothetical fact" that was inconsistent with evidence that the employee's furniture and the supervisor's furniture "could fit within the office with ample room left in the room." *Id.*

Finally, in a footnote, the Agency argues that, in the merits award, the Arbitrator "only states that the Agency violated the [parties' agreement], and there is no reference to the Statute or [f]ederal labor law which was clearly an issue in the grievance and an issue submitted to arbitration." *Id.* at 11 n.7. In this connection, the Agency notes that the Arbitrator's ordered posting "requires the Agency to state that it will comply with the Statute." *Id.* The Agency argues that "[t]o the extent the [merits] award did not address the issue of whether the Agency violated [f]ederal labor law, it is deficient because the Arbitrator exceeded his authority by failing to resolve an issue submitted to arbitration." *Id.*

B. Union Opposition

The Union argues that the merits award is not contrary to law because the Arbitrator correctly found that the Agency violated its *contractual*, not *statutory*, bargaining obligation, and, thus, he was not required to apply the *FCI* factors. Opp'n at 3-4, 7-8. In addition, the Union contends that the Arbitrator was not required to direct the Agency to move the employee to any particular office. *Id.* at 6.

The Union also argues that the merits award is not based on a nonfact because, in finding a contractual violation, the Arbitrator did not rely solely upon his finding that the placement of the supervisor's furniture could have reduced the employee's work space below the minimum square footage set forth in the agreement. *Id.* at 8-9. According to the Union, the Arbitrator found that the square-footage requirement was only one example of the aspects of the move over which the Agency failed to bargain. *Id.* at 9.

In response to the Agency's allegation that the Arbitrator exceeded his authority, the Union argues that the finding of a contractual violation is a sufficient basis for sustaining the award, and "it is unnecessary to address an alleged statutory violation." *Id.*

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2. The Authority applies the factors set forth in *FCI*, 8 FLRA at 605-06, to determine whether SQA relief is appropriate to remedy a violation of the statutory duty to bargain.

3. However, the Agency concedes, as it did before the Arbitrator, that returning the employee to the newsroom would be less disruptive to the Agency's mission than returning her to the studio. Exceptions at 18-19.

IV. Analysis and Conclusions

A. The awards are not contrary to law, rule, and/or regulation.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award *de novo. See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. 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 legal standard. *See U.S. Dep't of Def. Dep'ts of the Army & the Air Force, Ala. Nat'l Guard Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DOD*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

1. The finding that the Agency violated its bargaining obligation.

Where a grievance involves a dispute regarding a bargaining obligation as defined by the parties through an agreement, "the issue of whether the parties have complied with the agreement becomes a matter of contract interpretation for the arbitrator." *SSA, Balt., Md.*, 55 FLRA 1063, 1068 (1999) (*SSA*). Here, the Arbitrator found that the Agency violated a contractual obligation to bargain. *See* Merits Award at 13. As such, he was interpreting the parties' agreement, not the Statute. Thus, the Authority precedent cited by the Agency -- which involves the duty to bargain under the *Statute* -- is inapposite and provides no basis for finding the award contrary to law.[4] *See SSA*, 55 FLRA at 1068-69. Accordingly, we deny the exception.

2. The award of SQA relief.

The Authority has held that arbitrators have "great latitude in fashioning remedies" for contractual violations. *AFGE, Local 916*, 57 FLRA 715, 717 (2002) (*Local 916*) (quoting *NTEU, Chapter 68*, 57 FLRA 256, 257 (2001) (*Chapter 68*)). In this regard, where an arbitrator crafts a remedy to redress a *contractual* violation, the arbitrator is not required to adopt a remedy that might be appropriate in disposing of a *statutory* violation. *See Local 916*, 57 FLRA at 717 (contractual violation remedy based on arbitrator's interpretation of parties' agreement, rather than the Back Pay Act, not contrary to law); *Chapter 68*, 57 FLRA at 257; *AFGE, Council 215, Nat'l Council of SSA OHA Locals*, 46 FLRA 1518, 1523-24 (1993) (*Council 215*). Specifically, where an arbitrator finds that an agency's refusal to bargain violates a collective bargaining agreement, the propriety of SQA relief is governed by the arbitrator's remedial authority under the violated agreement, rather than the *FCI* factors. *Chapter 68*, 57 FLRA at 257; *Council 215*, 46 FLRA at 1523-24.

In the remedy award, the Arbitrator found that SQA relief was appropriate under the parties' agreement. Although the Arbitrator did not restore the status quo prior to the *first* move, which would have required returning the employee to the studio, he found that restoring the status quo prior to the *second* move was "consistent with the intent of the . . . drafters" of the parties' agreement, and would satisfy the Union's "contractual" rights, because the newsroom was an office the employee had occupied in the "chain of events giving rise to the grievance." Remedy Award at 4. Thus, the Arbitrator's relocation of the employee to the newsroom, rather than the studio, was an appropriate exercise of the Arbitrator's "great latitude in fashioning remedies" for contractual violations.[5] *See Local 916*, 57 FLRA at 717 (quoting *Chapter 68*, 57 FLRA at 257). Further, because this remedy resulted from the Arbitrator's interpretation and application of the agreement, he was not required to apply the *FCI* factors. *See Chapter 68*, 57 FLRA at 257; *Council 215*, 46 FLRA at 1523-24.

With regard to the Agency's argument that the Arbitrator "inappropriately considered what he believed were repeated violations of Article 26, Section 4[,]" Exceptions at 17, the Arbitrator's statements to which the Agency refers were dicta. *See, e.g., NFFE, Local 1827*, 52 FLRA 1378, 1385 (1997) (*NFFE*) (citing *AFGE, Local 1668*, 51 FLRA 714, 719 (1995)) (dicta are statements separate from

4. The Authority has held that where a contract provision restates a provision of the Statute, the Authority "must exercise care" to ensure that an arbitral interpretation of the contract provision is consistent with the Authority precedent interpreting the statutory provision. *Gen. Servs. Admin., Region 9, L.A., Cal.*, 56 FLRA 683, 685 (2000) (quoting *U.S. Dep't of Def., Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 43 FLRA 147, 153 (1991)). Although the Agency asserts generally that its "bargaining obligations concerning changes in conditions of employment are defined by Authority case law[,]" Exceptions at 4, the Agency does not allege, and there is no basis for concluding, that Section 4 of the agreement restates a provision of the Statute.

5. We note that the Agency does not argue that the remedy award fails to draw its essence from the parties' agreement.

the award and do not provide a basis for finding an award deficient). As such, the statements do not provide a basis on which to find the award deficient. *See, e.g.*, *NFFE*, 52 FLRA at 1384-85.

For the foregoing reasons, we find that the Agency provides no basis for finding that the award is contrary to law, and we deny these exceptions.

B. The merits award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See Nat'l Labor Relations Bd.*, 50 FLRA 88, 92 (1995) (*NLRB*).

The Agency asserts that the award is based on a nonfact insofar as the Arbitrator found that furniture placement "could have" reduced the employee's personal work space below the sixty-square-feet minimum set forth in the agreement. Exceptions at 13-15. To the extent that the Agency argues that the configuration of the furniture could *not* have reduced the employee's personal work space below sixty square feet, this possibility was disputed by the parties at arbitration. *See* Hr'g Tr. at 143-45, 227. As such, the Agency does not provide a basis for finding that the merits award is based on a nonfact in this respect. *See Local 1984*, 56 FLRA at 41.

Further, the Agency has not established that the disputed fact is a central fact underlying the award, but for which the Arbitrator would have reached a different result. Regardless of whether the employee's personal work space had the potential to be reduced below the sixty-square-feet minimum, the Arbitrator found that this was only one of several topics about which the Union was entitled, and sought, to bargain under Section 4. *See* Merits Award at 12-14. Moreover, to the extent the Agency is challenging the Arbitrator's interpretation of the parties' agreement, as noted above, an arbitrator's conclusion that is based on an interpretation of a collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA at 92.

For the foregoing reasons, we deny the exception.

C. The Arbitrator did not exceed his authority.

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance. *See U.S. Dep't of Def., Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).

The Authority has consistently held that, when an arbitrator bases an award on two or more separate and independent grounds, the appealing party must establish that all of the grounds relied on are deficient in order for the Authority to find the award deficient. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Wash., D.C.*, 64 FLRA 559, 561 (2010) (*DoJ*); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 435 (2010) (*IRS*); *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000) (*Oxon Hill*); *U.S. Dep't of Labor, Wash., D.C.*, 55 FLRA 1019, 1023 (1999) (Member Cabaniss dissenting) (*Labor*). Therefore, "if the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the [a]rbitrator, it is unnecessary to address exceptions to the other ground." *Oxon Hill*, 56 FLRA at 299. *See also DoJ*, 64 FLRA at 561-62; *IRS*, 64 FLRA at 435; *Labor*, 55 FLRA at 1023. In addition, after finding a bargaining obligation violation, the Authority has declined to find additional violations where such a finding would be only cumulative and would not materially affect the remedy. *See, e.g., U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C.*, 63 FLRA 406, 408 n.1 (2009), *recons. denied* 63 FLRA 600 (2009) (*Homeland*).

The Agency argues, in a footnote in its exceptions, that "[t]o the extent the [merits] award did not address the issue of whether the Agency violated [f]ederal labor law, it is deficient because the Arbitrator exceeded his authority by failing to resolve an issue submitted to arbitration." Exceptions at 11 n.7. As discussed above, Section 4 establishes, and the Arbitrator found, a contractual bargaining obligation separate and independent of any statutory bargaining obligation. Thus, the Agency must demonstrate that this separate and independent ground is deficient in order for the Authority to find the award deficient, and the Agency has failed to do so. *See DoJ*, 64 FLRA at 561-62; *IRS*, 64 FLRA at

435; *Oxon Hill*, 56 FLRA at 299; *Labor*, 55 FLRA at 1023. Further, because the Arbitrator's finding that the Agency violated this contractual bargaining obligation provides a sufficient basis for the awards, it is not necessary to remand this matter to the Arbitrator for a determination on the alleged statutory violation because such a determination would be only cumulative and would not materially affect the remedy. *Cf. Homeland*, 63 FLRA at 408 n.1. We note,[6] in this regard, that the Agency does not request that the Authority remand this matter.

For the foregoing reasons, the Agency's exception does not provide a basis for setting aside the award, and we deny the exception.

V. Decision

The exceptions are denied.

6. We also note that the Agency does not object to the wording of the Arbitrator's ordered posting, which "requires the Agency to state that it will comply with the Statute." Exceptions at 11 n.7.