64 FLRA No. 206

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1916
(Union)

and

UNITED STATES
DEPARTMENT OF ENERGY
NATIONAL ENERGY TECHNOLOGY
LABORATORY
PITTSBURGH, PENNSYLVANIA
(Agency)

0-AR-4547

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DECISION

July 30, 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 an award of Arbitrator Philip W. Parkinson 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 exceptions.

The Arbitrator granted, in part, the Union's grievance, which alleged that the Agency violated its statutory and contractual duty to send a duly authorized representative to negotiations. In particular, the Arbitrator found that the Agency could continue to send someone other than the Agency Director (Director) to negotiations, subject to limitations that the Arbitrator set forth in the award. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency insisted that someone other than the Director represent the Agency at negotiating sessions concerning a drug-testing program. Award at 1. In light of an Agency policy that any written agreement does not become final until the Director has signed it, the Union filed a grievance alleging that the Agency's refusal to send the Director to negotiations violated the Agency's duties under § 7114(b)(1), (2), and (5) of the Statute,[1] as well as the Agency's duty to bargain in good faith pursuant to the parties' agreement.[2] *Id.*

When the grievance was unresolved, it was submitted to arbitration, where the Arbitrator did not expressly frame the issue. Before the Arbitrator, the Union argued that an Agency "Redelegation Order" (the Order) authorizes only the Director to negotiate conditions of employment. *Id.* at 7. The Order states, in pertinent part, that the Agency's Director of Human Capital Management delegates to the Director the authority to:

> Serve as the duly authorized representative under 5 U.S.C. [§] 7114(b)(2) and as collective bargaining official for the [Agency] and administer the labor-management relations program within the organization in accordance with 5 U.S.C. Chapter 71[.] . . . This authority can not be further delegated.

Exceptions, Attach. Union Ex. 9 (Department of Energy Redelegation Order No. 00-010.01-01.03) at 1 (Order). The Union asserted that the Order, as well as "the Agency's insistence that [an] agreement is not executed and finalized until [the Director's] signature is affixed[,]" require the Agency to send the Director to negotiations because the Director is the Agency's only authorized representative within the meaning of the Statute. Award at 7-8.

1. Section 7114(b) of the Statute provides, in pertinent part, that "[t]he duty of an agency and an exclusive representative to negotiate in good faith" includes the obligation "(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement; (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;" and "(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement." 5 U.S.C. § 7114(b).

2. Article 12 of the parties' agreement pertinently provides: "Management and the Union agree to conduct good faith impact and implementation negotiations with full disclosure of information relating to the impact and implementation as obligated by 5 U.S.C. [Chapter] 71, other relevant policies and procedures, and this Agreement." Award at 10.

Before the Arbitrator, the Agency asserted that its chief negotiator was fully authorized to "discuss, negotiate, and agree on terms and conditions." *Id.* at 9. The chief negotiator testified that Agency policy permits the Director to designate someone to negotiate in good faith on his behalf, but also requires the Director's signature in order to execute a negotiated agreement. *Id.* The Agency argued that the Director's managerial duties and travel schedule make it impractical for him to participate in negotiations, but contended that its offer during ground-rule negotiations to have the Director sign any written agreement immediately after the conclusion of negotiations should "effectively invalidate the Union's concerns." *Id.* at 8-9.

Based on the foregoing, the Arbitrator concluded that the Union had a "legitimate concern" because the Agency's chief negotiator was "not, by statute, the authorized person to sign and execute such an agreement." *Id.* at 11. However, the Arbitrator found that the Agency's offer to have the Director sign any agreement reached by the chief negotiator addressed the Union's concerns that the Agency might decline to execute -- or delay executing -- such an agreement. *Id.* at 12. Thus, the Arbitrator concluded that, "given the circumstances, particularly because of the Director's frequent absences from the facility, . . . the Agency's Director may appoint an authorized representative to act as the spokesperson and chief negotiator." *Id.* However, the Arbitrator specified that "the Director must be held to all terms and conditions as agreed to between his chief negotiator and the Union[,]" and "the Director's signature must be affixed to the terms of the Agreement 'immediately after the conclusion of negotiations[.]'" *Id.* "Thus," the Arbitrator reasoned, "the Union would be dealing at the negotiating table with a fully authorized representative of the Agency, since the Agency's representative's agreed-to terms must also be that of the Director's." *Id.* at 12-13. Accordingly, the Arbitrator granted the grievance "to the extent set forth in the above opinion." *Id.* at 13 (emphasis omitted).

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the Arbitrator "fashioned a resolution" that conflicts with § 7114(b) of the Statute because the Statute requires "the parties' authorized representatives at the bargaining table [to] have authority not only to negotiate but also [to] execute the agreement." Exceptions at 3-4 (citing *U.S. Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 44 FLRA 205, 206 (1992) (*Portsmouth*)). In addition, the Union argues that the Arbitrator's ordered remedy is contrary to an Agency regulation, specifically, the Order. In this connection, according to the Union, the Order establishes that: (1) only the Director may serve as the Agency's duly authorized representative under § 7114(b)(2) of the Statute; and (2) this authority cannot be further delegated. Exceptions at 3.

B. Agency's Opposition

The Agency asserts that the Arbitrator's remedy is consistent with § 7114(b) of the Statute. Opp'n at 9. In addition, the Agency contends that the Union "incorrectly equat[es] the [Order] with Agency [r]egulation[,]" and asserts that the Order is "an order of the Agency, not a [r]egulation." *Id.* at 1 n.1. In the alternative, the Agency argues that permitting the Director to designate a chief negotiator, but requiring the Director's signature in order to execute a negotiated agreement, is consistent with the terms of the Order. *Id.* at 8-9.

IV. Analysis and Conclusions

Section 7122(a)(1) of the Statute provides that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation, including agency regulations. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 64 FLRA 513, 514 (2010) (*FAA*). 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). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

A. The remedy is not contrary to § 7114(b) of the Statute.

Section 7114(b) of the Statute obligates the Agency and the Union to approach negotiations with a sincere resolve to reach agreement, and to send representatives to the bargaining table who are fully authorized to discuss and negotiate any condition of employment. 5 U.S.C. § 7114(b)(1) & (2). If an agreement is reached, then the parties are required, "on the request of any party[,]" to execute a written

document embodying the agreed terms. *Id.* § 7114(b)(5). *Accord U.S. Dep't of Transp. Fed. Aviation Admin., Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 320 (1997) (agency committed an unfair labor practice when agency representative with "full authority to bargain" refused to sign document reflecting the parties' agreement). Under § 7114(b), an agreement is reached when authorized representatives of the parties come to a meeting of the minds with respect to the terms over which they have been bargaining. *See U.S. Dep't of Def., Dependents Sch.*, 55 FLRA 1108, 1111 (1999) (*DOD*) (citing *Int'l Org. of Masters, Mates & Pilots*, 36 FLRA 555, 560 (1990)). The Authority has held that, "[a]lthough parties are required, on request, to reduce to writing any oral agreement they have reached, the fact that an agreement need only be reduced to writing *when requested* implies that a written agreement is not always necessary." *DOD*, 55 FLRA at 1111-12 (holding that oral, and even "tacit," agreements may be binding upon the parties). Thus, an agreement need not be reduced to writing in order to bind the parties. *See id.*

The Union argues that the Statute requires that "the parties' authorized representatives at the bargaining table . . . have authority not only to negotiate but also t[o] execute the agreement." Exceptions at 3. However, the Authority has not so held. In this connection, although a party may rightfully insist that another party's bargaining representative be authorized to negotiate any condition of employment and reach a binding "meeting of the minds," the Statute does not require that this representative also be authorized to execute any written agreement that a party may request under § 7114(b)(5). *Cf. DOD*, 55 FLRA at 1112 ("the fact that the Union did not immediately sign and return the [memorandum of understanding] does not affect the binding nature of the parties' agreement,").

Portsmouth, cited by the Union, is distinguishable from this case. In *Portsmouth*, the parties had a practice whereby no agreement reached at the bargaining table was treated by the parties as "final or binding" until it was "reviewed and signed[.]" 44 FLRA at 207. The Authority held that this practice constituted a "clear and unmistakable waiver by each party of its right under [§] 7114(b)(2) of the Statute to insist that the other party send representatives to the bargaining table who are duly authorized to reach agreement." *Id.* In contrast, here, the award clarifies that the chief negotiator *is* an authorized representative under § 7114(b)(2), and, thus, any agreement that the parties reach at the bargaining table would bind the Agency notwithstanding the fact that the Director is required to sign it upon either party's request that the agreement be reduced to writing. The Union does not establish that the Arbitrator's remedy is contrary to § 7114(b) of the Statute merely because the Agency's bargaining representative is not authorized to sign any written memorialization of the parties' agreement. Accordingly, for the foregoing reasons, we find that the remedy is not contrary to § 7114(b) of the Statute.

B. The remedy is not contrary to the Order.

The Order delegates to the Director the authority to "[s]erve as the duly authorized representative under 5 U.S.C. [§] 7114(b)(2) and as collective bargaining official for the [Agency] and administer the labor-management relations program[,]" and provides that "[t]his authority can not be further delegated." Order at 1. As part of his directed remedy, the Arbitrator determined that the Director could "appoint an authorized representative to act as the spokesperson and chief negotiator." Award at 12. The Arbitrator's remedy does not disturb the Agency's policy that the Director must sign any written agreement, but requires that "the Director must be held to all terms and conditions as agreed to between his chief negotiator and the Union[,]" and that "the Director's signature must be affixed to the terms of the Agreement 'immediately after the conclusion of negotiations.'" *Id.* Nothing in the record establishes that where a chief negotiator has the authority to reach a binding agreement on terms and conditions of employment, but the Director retains ultimate authority to execute any negotiated agreement, a "further delegat[ion]" has occurred within the contemplation of the Order. *See* Order at 1. Accordingly, we find that the Arbitrator's remedy does not conflict with the Order. [3]

V. Decision

The Union's exceptions are denied.

3. As discussed previously, the parties dispute whether the Order is an Agency regulation. Having found that the award is not contrary to the Order, it is not necessary for the Authority to resolve that dispute.