65 FLRA No. 162

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1917
(Union)

0-AR-4290

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DECISION

April 28, 2011

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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 Martin Ellenberg filed by the Agency under § 7122 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 Agency's exceptions.

The Arbitrator sustained a grievance alleging that the Agency violated the parties' agreement when it issued a memorandum regarding fugitive cases worked by its Fugitive Operations (FUGOPS) teams (Memorandum). For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency issued the Memorandum to all of its Field Office Directors. The Memorandum stated, in relevant part: "Effective immediately, fugitive cases worked by the [FUGOPS] teams will be prioritized by threats posed by the fugitive alien. This memorandum also establishes a new target goal of 1,000 fugitive apprehensions/cases closed per FUGOPS team." Award at 2.

Subsequently, the Union presented a grievance alleging that requiring FUGOPS teams "'to apprehend/close 1,000 targeted cases per year' is a 'significant change'" that affects deportation officers and support personnel and that, pursuant to Article 9(A) of the parties' agreement, the Agency "is contractually bound to notify the [U]nion of any significant changes that may affect the bargaining unit." *Id.* (quoting grievance). The grievance also stated that the Union had not been provided an opportunity to discuss with the Agency whether the "goals are realistic and attainable." *Id*. (internal quotation marks omitted).

The grievance was denied. The matter was unresolved and submitted to arbitration. The parties stipulated to the following issue: "Did the Agency violate Article 9(A) of [the parties' agreement] when it issued [the] Memorandum . . . ? If so, what shall be the remedy?"[*] *Id.* at 3.

The Arbitrator found that the Agency violated Article 9 of the parties' agreement when it issued the Memorandum "prior to engaging the Union in pre-decisional discussion." *Id.* at 11. In making this determination, the Arbitrator rejected the Agency's argument that, because the policy introduced in the Memorandum did not change the working conditions of unit employees, it was not required to provide notice to the Union pursuant to Article 9. *Id*. at 9 (noting that the Agency argued that, to determine whether a violation of Article 9(A) occurred, "there must first be a finding that the [Agency] changed unit employees' conditions of employment"). According to the Arbitrator, the issue to be decided was not "whether there ha[d] been a change in working conditions or whether an employee was, or may be in the future, inappropriately disciplined," but, rather, whether the Agency "violated Article 9 *when it issued* the Memorandum." *Id.* at 9-10 (emphasis in original).

The Arbitrator found that the "intent" of Article 9 is to avoid grievances and arbitration. *Id.* at 10. According to the Arbitrator, the language of the provision "does not suggest that the Union should be required to grieve or seek arbitration in order to have a new policy, which *may* impact on working conditions, explained or discussed prior to its publication." *Id.* (emphasis in original). The Arbitrator found that the Agency cannot "make a unilateral decision" that a "new policy does not impact" employees' working conditions "and then

[*] The relevant text of Article 9 is set forth in the appendix to this decision.

refuse to respond to the Union's questions concerning the policy." *Id.* The Arbitrator found that such conduct leaves the Union with "no course of action other than through the grievance procedure" – precisely "what Article 9 was intended to avoid." *Id.*

The Arbitrator further found that Article 9(B), "clearly defines the procedure to be followed" by the parties. *Id.* According to the Arbitrator, that provision provides that, "[w]ithin twenty-two (22) work days after being served with the notice of the proposed change, the [Union] . . . may request additional information necessary to clarify or determine the impact of the proposed change." *Id.* Finally, the Arbitrator noted that "Article 9 does not hamper the ability of the Agency to issue new policies" and that the Agency "is not required to secure the Union's agreement" to do so. *Id.*

The Arbitrator found that the Agency violated the "procedure clearly defined in Article 9 when it did not advise or permit the Union to 'engage in pre-decisional involvement prior to the [A]gency's formal presentation.'" *Id.* (quoting Article 9(A)*; see also id.* at 11 (finding that Agency violated Article 9(A) when it issued the Memorandum prior to engaging the Union in pre-decisional discussion). As a remedy, the Arbitrator directed the Agency to "promptly advise the Union in writing . . . of the explanation for the change in policy in accordance with the provisions of Article 9(A), thereby leaving the [U]nion to determine whether it wishes to pursue the procedures spelled out in Article 9(B)." *Id.* The Arbitrator retained jurisdiction to resolve any dispute concerning implementation of the award. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award does not draw its essence from the parties' agreement. Exceptions at 1-4. The Agency asserts that, contrary to the Arbitrator's interpretation, the parties' agreement does not require pre-decisional involvement, but, rather, "only encourages" such involvement "when there is a change in working conditions." *Id.* at 3 & 4; *see also id.* at 8 (noting that the parties' agreement "neither requires the Agency to notify the [U]nion, nor engage the Union in pre-decisional involvement, when there is no impact on working conditions"). The Agency contends that its interpretation is supported by the plain language of Article 9, which only "'encourage[s]' the parties to engage in pre-decisional involvement and further defines [the parties'] obligations when pre-decisional involvement is not used." *Id.* at 3 (quoting Article 9(A)).

The Agency also asserts that, because it is "not required to advise or permit the Union to engage in pre-decisional involvement[,]" the award is based on a nonfact. *Id.* at 4. According to the Agency, "[i]t is a fact that Article 9(A) defines the Agency's right to forego pre-decisional involvement;" accordingly the award "cannot state there is a violation of Article 9(A) when pre-decisional involvement is not used . . . ." *Id.*

Finally, the Agency contends that the award is contrary to law because it "allows the Union to bargain over the substance of a reserved management right when there is no change in working conditions." *Id.* at 9. The Agency asserts that Article 9 "is a procedures and appropriate arrangements (impact and implementation (I&I)) mid-term bargaining article that is intended to follow the rights identified in [§] 7106" of the Statute, and that, under its terms, the Agency is "to notify the [U]nion when there are changes in working conditions that create a duty to bargain over negotiable employment issues." *Id.* at 6-8. According to the Agency, because there was no change to the employees' working conditions, no bargaining obligation exists. *Id.* at 6.

B. Union's Opposition

The Union asserts that the Agency's essence contention is "mere disagreement" with the Arbitrator's interpretation of Article 9(A) and, accordingly, provides no basis for finding the award deficient. Opp'n at 2, 6 & 8. Moreover, according to the Union, the Authority previously has "recognized the Agency's duty to issue advance notice of proposed changes under Article 9(A)." *Id.* at 6 (citing *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport Queens, N.*Y., 62 FLRA 129 (2007)).

The Union also contends that, contrary to the Agency's contention, the plain language of the agreement supports the Arbitrator's interpretation. The Union notes that, although Article 9(A) refers to situations in which pre-decisional involvement is not used, Article 9(A) also provides that, in such situations, the Agency "shall present the changes and explanation of the changes, including the reasons for the changes, it wishes to make to existing rules, regulations, and existing practices to the Union in writing." *Id.* at 6 n.1 (internal quotation marks omitted). According to the Union, whether it is called "pre-decisional involvement," "notice . . . is

clearly mandated under Article 9(A)." *Id.* (internal quotation marks omitted).

The Union also disputes the Agency's claim that pre-decisional involvement cannot be ordered pursuant to Article 9 absent a finding that the Agency's decision represents a change in conditions of employment. *Id.* at 7-8. According to the Union, the Arbitrator reasonably concluded "that Article 9(A) is a procedural provision intended to eliminate unnecessary grievances which would seek 'to have a new policy, which *may* impact on working conditions, explained or discussed prior to publication.'" *Id.* at 8 (quoting Award at 10) (emphasis in original).

With respect to the Agency's nonfact claim, the Union contends that the Agency has not identified any fact upon which the Arbitrator relied that is erroneous. *Id.* at 9. According to the Union, without such a fact, the Agency's claim has no merit. *Id.* at 9-10.

Finally, the Union contends that the Agency's assertion that the award is contrary to law is meritless. *Id.* at 10. The Union contends that the award – which merely requires the Agency to provide notice of proposed changes to policies and procedures and does not require the Agency to secure the Union's agreement regarding such changes – does not "infringe[] on any potential management rights to promulgate policies and procedures . . . ." *Id.* According to the Union, an award cannot be contrary to § 7106 "where it simply enforces an agreed[-]upon notice provision[,] but does not limit any management rights." *Id.*

IV. Analysis and Conclusions

A. The award draws its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Agency asserts that, contrary to the Arbitrator's interpretation, the parties' agreement does not require pre-decisional involvement, but, rather, "only encourages" such involvement "when there is a change in working conditions." Exceptions at 3.

Article 9 provides, in relevant part, that:

> The [p]arties are encouraged to engage in pre-decisional involvement prior to the agency's formal presentation of proposals for working conditions under this article. If the [p]arties are unable to reach an agreement through pre-decisional involvement or if pre-decisional involvement is not used, the [Agency] shall present the changes and explanation of the changes, including the reason for the change(s) it wishes to make to existing rules, regulations, and, existing practices to the Union in writing. . . . If the Union intends [to] exercise its bargaining rights regarding the proposed change, it must submit a timely bargaining demand including proposals, in accordance with the procedures and time frames specified below.

Award at 3. The Arbitrator found that the Agency violated this provision when it issued the Memorandum prior to engaging the Union in "pre-decisional discussion." *Id.* at 11. As a remedy, he directed the Agency to "promptly advise the Union in writing . . . of the explanation for the change in policy in accordance with the provisions of Article 9(A), thereby leaving the [U]nion to determine whether it wishes to pursue the procedures" provided in Article 9(B). *Id.*

The Agency has not identified any language in the parties' agreement that defines "change" in "working conditions." Further, Article 9(A) requires the Agency to provide the Union with notice of a proposed change even if pre-decisional involvement is not used and affords the Union the opportunity to determine whether to pursue the procedures provided under Article 9(B) with regard to the proposed

change. Based on the wording of Article 9, the Agency has failed to demonstrate that the Arbitrator's interpretation and application of Article 9 manifests a disregard of the agreement or is implausible, irrational, or unfounded. Accordingly, we find that the Agency's exception provides no basis for finding that the award fails to draw its essence from the parties' agreement and deny this exception.

B. The 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 U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). However, the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. *Id.* at 594 (citing *Nat'l Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985)). Additionally, an arbitrator's interpretation of a collective bargaining agreement does not constitute a matter that can be challenged as a nonfact. *See AFGE, Nat'l Council of EPA Locals, Council 238*, 59 FLRA 902, 904 (2004) (citing *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 489, 493 (2001)).

The Agency's nonfact exception challenges the Arbitrator's interpretation of Article 9(A) of the parties' agreement, specifically his determination that the Agency violated the procedure defined in Article 9(A) when it did not advise or permit the Union to engage in pre-decisional involvement regarding the change to its FUGOPS teams. Because the Agency's exception challenges the Arbitrator's interpretation of the parties' agreement, it does not provide a basis for finding that the award is based on a nonfact. *See id.*

Accordingly, we deny this exception.

C. The award is not contrary to law.

The Agency contends that the award is contrary to law because it "allows the Union to bargain over the substance of a reserved management right when there is no change in working conditions." Exceptions at 9. The Agency asserts that Article 9 "is a procedures and appropriate arrangements [I&I] mid-term bargaining article that is intended to follow the rights identified in [§] 7106" of the Statute, and that, under its terms, the Agency is "to notify the Union when there are changes in working conditions that create a duty to bargain over negotiable employment issues." *Id.* at 6-8.

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 *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 standard of law. *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. *See id.* Also, 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." *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (*Broad. Bd.*) (citing *SSA, Balt., Md.*, 55 FLRA 1063, 1068 (1999) (*SSA*)). In those circumstances, the Authority applies the deferential standard to the arbitrator's contract interpretation. *See SSA*, 55 FLRA at 1069-70.

The instant dispute did not involve a claim that the Agency failed to satisfy its statutory bargaining obligation under the Statute; rather, the issue before the Arbitrator was whether the Agency met its contractual obligation under the notice provision of Article 9. The record shows that the Arbitrator noted the Agency's reference to § 7106 of the Statute and its argument that the "new policy introduced in the Memorandum did not change the working conditions of . . . unit employees . . . ." Award at 9. However, the Arbitrator expressly found that the stipulated issue before him was not "to determine whether there ha[d] been a change in working condition[s]," but, rather, "to determine whether the Agency violated Article 9 *when it issued* the [m]emorandum . . . ?" *Id.* at 9 &10 (emphasis in original). This finding is supported by the record evidence, which shows that the parties stipulated the issue as: "Did the Agency violate Article 9(A) . . . when it issued [the] Memorandum . . . ? If so, what shall be the remedy?" *Id.* at 3. Because the matter here involves a contractual violation, 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. *See, e.g., Broad. Bd.*, 64 FLRA at 891. *See also U.S. Dep't of Def., Nat'l Guard Bureau, Adjutant Gen., Kan. Nat'l*

Guard, 57 FLRA 934, 936-37 (2002). Moreover, as found above, the Agency failed to demonstrate that the Arbitrator's interpretation of this provision did not draw its essence from the parties' agreement.

Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.

APPENDIX

Article 9 - Impact Bargaining and Mid-Term Bargaining

A. *Notice of Proposed Change*. The Parties recognize that from time-to-time during the life of the Agreement, the need will arise for Management to change existing Service regulations covering personnel policies, practices, and/or working conditions not covered by this Agreement. The Parties are encouraged to engage in pre-decisional involvement prior to the agency's formal presentation of proposals for working conditions under this article. If the Parties are unable to reach an agreement through pre-decisional involvement or if pre-decisional involvement is not used, the Service shall present the changes and explanation of the changes, including the reason for the change(s) it wishes to make to existing rules, regulations, and, existing practices to the Union in writing. The Service recognizes that this obligation exists at the National, Regional and District level depending upon the level at which such changes originate. If the Service proposes a change in working conditions in locals in more than one region, such as for Telephone Centers or Service Centers, it shall serve the requisite notice on the Council at the National level. If the Union intends [to] exercise its bargaining rights regarding the proposed change, it must submit a timely bargaining demand including proposals, in accordance with the procedures and time frames specified below.

B. *Bargaining Procedures.* As applicable, mid-term bargaining shall be conducted in accordance with the following procedures and time frames:

(1) National Level Bargaining

(a) *Notice of Proposed Change*. When bargaining is appropriate at the National Level, Management shall serve its notice of the proposed change upon the President of the Council or his or her designee.

(b) *Demand to Bargain/Information*. Within twenty-two (22) workdays after being served with the notice of the proposed change, the President of the Council, or his or her designee, may request any additional information necessary to clarify or determine the impact of the proposed change. At the same time they shall serve any bargaining demand in writing upon the Chief, Labor and Employee Relations Policy Section, INS Headquarters, or such other person as may have been identified for this purpose in the Service's notice to the Union.

Award at 3; Exceptions, Attach. at 11-12.