65 FLRA No. 32

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. CORPS OF ENGINEERS
NORTHWESTERN DIVISION
(Agency)

and

UNITED POWER
TRADES ORGANIZATION
(Union)

0-AR-4651

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DECISION

September 30, 2010

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

I. Statement of the Case

The matter is before the Authority on exceptions to an award of Arbitrator Jean A. Savage 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 Agency's exceptions.

The Arbitrator sustained a grievance alleging that the Agency violated the parties' collective bargaining agreement (parties' CBA) when it denied the grievant's (the Union President) request for official time in May 2009. For the reasons that follow, we grant the Agency's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

In November 2007, the Agency issued a memorandum (Agency Memo) informing managers about the procedures in the parties' CBA for requesting official time. Award at 4. The Union disagreed with the procedures set forth in the Agency Memo, contending that the CBA did not require the level of specificity outlined in the memo. The Union then filed a grievance, which the Agency denied. *Id.* The matter was submitted to arbitration. In October 2008, Arbitrator Kienast issued an award denying the grievance (Kienast Award).

Subsequently, Agency management and the grievant "agreed to an arrangement in which the [g]rievant could put asterisks [(Asterisk Procedure)] on days [that] he was requesting [official time] and attach a document listing purposes[.]"[2] *Id.* The Agency later informed the grievant that it "need[ed] more specificity to [his official time] request[s]." *Id.* The grievant did not comply. The Agency then denied his April 2009 requests for official time, stating that the requests were not in compliance with the CBA and the Kienast Award. *Id.* The Union then filed a grievance, which was also submitted to arbitration. In October 2009, Arbitrator Hauck issued an award sustaining the grievance (Hauck Award). *Id. at* 5.

In May 2009, the Agency again denied several of the grievant's official time requests, and the Union filed another grievance. The matter was not resolved and was submitted to arbitration on the following stipulated issue: "Whether the Agency violated the [CBA] and/or relevant law when it denied Union President's May, 2009 request for official time. If so, what is the remedy?" *Id.* at 2.

In the award now before the Authority, the Arbitrator sustained the grievance, concluding that the Agency violated Article 16.5 and 28.4 of the parties' CBA when it denied the grievant's official

1. Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

2. The arrangement provided as follows:

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> The requested official time will be used for one or more of the following purposes:
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> - Research and preparation for grievances or arbitrations.
> - Review and preparation of correspondence with management.
> - Administration of the CBA.
> - Phone calls in regards to the administration of the CBA.
>
> Past practice and the CBA [do] NOT require this level of specificity and it is given *under protest.* In addition, past practice has been established that "after the fact" changes have been allowed. These have been communicated to the Supervisor and approved by him. This practice will continue.

Award at 4 (emphasis in original).

time requests.[3] The Arbitrator found that the grievance, as it concerned the grievant's requests for May 11, 19, and 20, 2009, "is the same dispute that was resolved in the Hauck [A]ward." *Id.* at 7. Specifically, the Arbitrator found that, except for different dates, the parties, issue, contractual provisions, facts, arguments, and evidence were the same in both cases and that "there [were] no 'materially changed circumstances.'" *Id.* at 7 & 8. Moreover, after examining the transcript and Arbitrator Hauck's "reasoning and conclusions," the Arbitrator found that there had been a full and fair hearing and that the award was "not logically flawed or erroneous in its interpretation of the parties' [CBA]" *Id.* at 8. Accordingly, the Arbitrator held that it was appropriate to give the Hauck Award preclusive effect. *Id.* at 7.

The Arbitrator then noted that the Hauck Award held that the Asterisk Procedure "constituted practices that 'will be treated for all purposes as if they [were] incorporated into this [a]greement,' as provided in Article 28.4." *Id.* at 10. The Arbitrator, thus, found that the parties were contractually bound to implement the Asterisk Procedure, beginning on the date the Hauck Award was issued and until they are able to reach agreement on new procedures. *Id.*[4] Accordingly, as a remedy, the Arbitrator, among other things, directed the Agency to "implement the [A]sterisk [P]rocedure beginning on October 26, 2009, the date the Hauck [A]ward issued, until the parties are able to reach agreement on procedures for requesting official time." *Id.* at 14.

III. Preliminary Issue

The Union asserts that the Agency's exceptions are untimely. Opp'n at 4. The Union contends that the Arbitrator e-mailed the award to the parties on April 5, 2010,[5] and mailed signed copies of the award to the parties on April 6, the date of the postmark. *Id.* at 5. Citing Authority precedent, the Union argues that the award's date of service is the earlier of the two dates -- April 5 -- and, thus, to be timely, the exceptions must have been postmarked by May 4. *Id.* The Union contends that, as the Agency's exceptions were not filed until May 7, the exceptions are untimely. *Id.*

On June 18, the Authority's Office of Case Intake and Publication (CIP) issued to the Agency an order to show cause why its exceptions should not be dismissed as untimely (Order). In the Order, CIP stated that "when an award is served by two methods, timeliness is measured based on completion of the earliest method of service of the award." Order at 2 (citing *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol*, 63 FLRA 345, 346 (2009), *recons. denied* 64 FLRA 807 (2010) (*Border Patrol*); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 60 FLRA 966, 967 (2005) (*IRS*)). CIP stated that the award was "first e-mailed to the parties on April 5," and, as such, to be timely, any exceptions to the award had to be filed no later than May 4. *Id.* Because the Agency's exceptions were filed with the Authority by mail on May 7 (the date of the postmark), CIP stated that it appeared the exceptions were untimely. *Id.*

In response to the Order, the Agency asserts that Article 6.15 of the parties' CBA "limits the method of service to mail for arbitration awards." Agency Response to Order at 2. In particular, the Agency contends that Article 6.15 "clearly establishes the mailing of the award as the operative and proper method of service . . . ." *Id.* Moreover, the Agency asserts that the parties had an informal agreement that the award would be served "by mail" and that "mail would be the method of service for . . . the arbitration award." *Id.* at 2 & 3. The Agency contends that the award was served on the Agency by mail on April 6 and that because its exceptions were mailed to the Authority on May 7, the exceptions are timely.[6] *Id.* at 2.

In arbitration proceedings, the manner in which an arbitrator serves his or her award on the parties is a matter typically addressed informally by the arbitrator and the parties at, or after, the hearing; alternatively, it may be addressed in the arbitration

3. The relevant text of Articles 16 and 28 is set forth in the Appendix to this decision.

4. The Arbitrator also held that the Agency: (1) violated the parties' CBA when it denied the grievant's official time request for May 27 and (2) did not violate §§ 7102(1), 7131(d), or 7116(a)((1), (2), (5), or (8) of the Statute. Award at 12-13. As neither party excepts to these findings, we do not address them further.

5. All remaining dates are in 2010.

6. We note the Agency's claim that the Authority has allowed email service of arbitration awards in some cases without promulgating rules addressing that method of service. Agency Response to Show Cause Order at 3. We also note on July 21, 2010, the Authority issued its final rule clarifying the processing of arbitration cases, including email. *See* 75 FR 42283, 42290 (July 21, 2010) (§ 2425.2(c) of the Authority's Regulations concerns the methods of service of an arbitrator's award, including e-mail). The new regulations become effective on October 1, 2010.

provision of a collective bargaining agreement. *SSA Headquarters, Woodlawn, Md.*, 63 FLRA 302, 303 (2009) (*SSA*). Here, the Agency argues that Article 6.15 establishes mail as the method of service of arbitration awards. Article 6.15 provides, in relevant part, that an arbitrator's fee is reduced "for every day that the award is *mailed* later than the date required in this article." Award at 2. This wording supports the Agency's claim that mail is the method of service for the award. Accordingly, based on the parties' CBA and the Agency's undisputed assertions that the parties had an additional, informal agreement that the award would be served by mail, we find that the record demonstrates that the agreed-upon method of service for the award was mail.

The record shows that the award was served on the Agency by mail on April 6; as a result, to be timely, the Agency's exceptions had to be mailed by May 10. *Id.* at 2. Because the Agency's exceptions were mailed on May 7, they are timely.

IV. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the Arbitrator exceeded her authority by fashioning a remedy that was "beyond the scope of the stipulated issue." Exceptions at 11. Specifically, the Agency challenges the Arbitrator's order directing it to implement the "[A]sterisk [P]rocedure[.]" *Id.* at 7 & 8. The Agency asserts that requiring it implement this procedure "does not 'confine [itself] to those issues submitted to arbitration by the parties.'" *Id.* at 8.

In addition, the Agency contends that the Arbitrator failed to exercise "independent judgment" when she gave "preclusive effect" to the Hauck Award (citing *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 57 FLRA 4 (2001) (*Dep't of Agric.*)). *Id.* at 8, 9. The Agency asserts that the Arbitrator "did not independently analyze the merits of the case, nor did she . . . consider whether she agreed with Arbitrator Hauck's reasoning or result[s]." *Id.*

B. Union's Opposition

The Union asserts that the award directly addresses the stipulated issue, and that the Agency has not established that the award is deficient because the Arbitrator gave preclusive effect to the Hauck Award. Opp'n at 6, 7-8.

IV. Analysis and Conclusions

A. The Arbitrator exceeded her authority to the extent the award applies to individuals other than the grievant.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue, or the arbitrator's formulation of an issue to be decided in the absence of a stipulation, the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See NTEU*, 64 FLRA 982, 986 (2010) (citing *U.S. Info. Agency, Voice of Am.*, 55 FLRA 197 (1999). Nevertheless, if a grievance is limited to a particular grievant, then the remedy must be similarly limited. *See U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 538 (2010) (*Dep't of Energy*) (citing *U.S. Dep't of the Air Force, Air Force Logistics Ctr., Tinker Air Force Base, Okla.*, 45 FLRA 1234, 1240 (1992) (*Tinker AFB*).

In this case, the stipulated issue before the Arbitrator was: "Whether the Agency violated the [CBA] and/or relevant law when it denied [*the grievant's*] May, 2009 request for official time. If so, what is the remedy?" Award at 2 (emphasis added). The Arbitrator resolved this issue by determining that the parties were contractually bound to implement the "[A]sterisk [P]rocedure beginning on the date the Hauck [A]ward issued until they are able to reach agreement on [new] procedures." *Id.* at 10; *see also id.* at 14. Moreover, the Arbitrator's remedy requiring the Agency to implement the Asterisk Procedure until the parties are able to reach agreement on procedures is directly responsive to the issue. In this connection, it is well established that, where an arbitrator has found a contractual violation with regard to a particular agency action, the arbitrator may direct prospective relief, including directing the agency to comply with the violated contract provision in conducting future actions. *See, e.g., Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 517-20 (1986).

However, as set forth above, the grievance involved only the grievant's requests for official time. The Arbitrator, therefore, was authorized to award relief to the grievant only. *See Dep't of*

Energy, 64 FLRA at 538; *Tinker AFB*, 45 FLRA at 1240. The Arbitrator's remedy, however, directs the Agency to implement the Asterisk Procedure *generally* and does not limit its application to the grievant. *See* Award at 14 (directing the Agency to "implement the [A]sterisk [P]rocedure beginning on October 26, 2009, the date the Hauck [A]ward issued, until the parties are able to reach agreement on procedures for requesting official time."). Insofar as the award provides a remedy that applies to individuals other than the grievant, the award exceeds the Arbitrator's authority. Accordingly, we modify the award to clarify that this requirement applies only to the grievant.[7] *See, e.g.*, *Dep't of Energy*, 64 FLRA at 538, and the cases cited therein.

B. The award is not contrary to law.

The Agency contends that the award is contrary to Authority precedent because the Arbitrator failed to exercise independent judgment in giving preclusive effect to the Hauck Award. Exceptions at 9. 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 so doing, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Authority generally has held that an arbitrator is not bound by another arbitrator's award. *See, e.g., Dep't of Agric.*, 57 FLRA at 6 *(*citing *AFGE, Local 2459*, 51 FLRA 1602, 1606 (1996)). In this regard, the Authority has found that arbitrators are required to exercise independent and impartial judgment on issues before them. *See id.* at 6 (citing *AFGE, Local 1273*, 44 FLRA 707, 712 (1992)). However, arbitrators may consider reasoning and conclusions in other arbitration awards. *See id.*

In this case, contrary to the Agency's contention, the record shows that the Arbitrator exercised independent judgment in deciding to give preclusive effect to the Hauck Award. In evaluating the disputed issue, the Arbitrator reviewed the hearing transcript in the Hauck Award and found that "there was a full and fair hearing before Arbitrator Hauck." Award at 8. Additionally, the Arbitrator stated that she had "carefully examined Arbitrator Hauck's reasoning and conclusions and [found] that his award [was] not 'logically flawed or erroneous in its interpretation of the parties' [CBA]". *Id.* Only after this examination did the Arbitrator decide to give preclusive effect to the Hauck Award.

These findings show that the Arbitrator exercised independent judgment concerning the issue before her. Consequently, we find that the award is not contrary to Authority precedent, and we deny this exception.

V. Decision

The award is modified to apply to the grievant only. The remaining exceptions are denied.

7. We note the apparent inconsistency between the Arbitrator's finding that the Asterisk Procedure constituted a past practice that was incorporated into the parties' agreement and our determination that the remedy is limited to the grievant. This inconsistency, however, results from wording of the stipulated issue that the parties presented to the Arbitrator. Moreover, although the Arbitrator's remedy in this case should be limited to the grievant, the Arbitrator's underlying finding that the parties are contractually bound to implement the Asterisk Procedure is an integral part of the Arbitrator's resolution of the issue the parties placed before him.

APPENDIX

Article 6.15
ARBITRATION PROCEDURE

> Unless otherwise agreed by the parties, the Arbitrator shall furnish a complete report and award in writing to the [Agency] and the Union within thirty (30) calendar days following the close of the hearing or within thirty (30) calendar days of the *mailing* of the post hearing briefs, if the parties wish to file a brief. The Arbitrator's award shall be in writing and shall identify and discuss all issues raised by the parties . . . . The Arbitrator's fee shall be reduced by ten percent (10%) for every day that the *award is mailed* later than the date required in this article.

Agency's Response to Show Cause Order at 2 (emphasis in original). *See also* Award at 2.

Article 28
EFFECTIVE DATE, DURATION AND SCOPE OF THE AGREEMENT AND PAST PRACTICES

> 28.4 Laws, government[-]wide regulations and this Agreement take precedence over past practices. Existing and future working conditions, which are not inconsistent with this Agreement or law and are established through past practice, will be treated for all purposes as if they are incorporated into this Agreement and may only be modified or terminated through the exercise of the collective bargaining process.

Award at 3.

Member Beck, Dissenting In Part:

I agree with my colleagues' conclusion that the Arbitrator exceeded her authority by directing the Agency to apply the Asterisk Procedure to individuals other than the grievant. However, I disagree with my colleagues' determination that the Arbitrator was authorized to award prospective relief, as she did by directing the Agency to abide by the Asterisk Procedure in the future. Just as the stipulated issue before the Arbitrator was limited in terms of *whom* it covered (only the individual grievant), it was also limited in terms of the *time frame* that it covered -- only May of 2009.

To be sure, arbitrators have broad discretion in the fashioning of appropriate remedies. *See, e.g., VA*, 24 FLRA 447, 450 (1986). However, despite this deference, the Authority has adhered to the fundamental principle that arbitrators must confine their awards and remedies to those issues submitted for resolution. *See id.*, and the cases cited therein. Arbitrators "must not dispense their own brand of industrial justice." *U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 779 (2005) (then-Member Pope dissenting as to application) (quoting *VA*, 24 FLRA at 450).

The parties asked the Arbitrator to resolve the following stipulated issue:

> Whether the Agency violated the [parties'] collective bargaining agreement [CBA] and/or relevant law when it denied Union President's May, 2009 request for official time. If so, what is the remedy?

Award at 2. On its face, the issue was directed only at the Agency's processing of official time requests (1) submitted by the Union President for (2) May 2009. *Id.* at 10 (stating that the "parties limited the issue to be decided to the [Agency's] denial of several official time requests in May 2009"). Thus, the issue was specifically limited as to both the universe of employees affected *and* the time period involved. The Arbitrator's remedy should have been similarly limited. The Arbitrator here, however, ordered additional, prospective relief – that the Agency "implement the [A]sterisk [P]rocedure . . . *until the parties are able to reach agreement on procedures for requesting official time*." *Id.* at 14 (emphasis added). This sweeping, prospective remedy is neither necessary nor appropriate given the specific and limited nature of the grievance.

Moreover, the Majority's approach – finding that the Arbitrator exceeded her authority to the extent that she awarded relief to individuals other than the grievant, but not with respect to the time period – leads to an anomalous result. In reaching her decision, the Arbitrator concluded that the Asterisk Procedure constituted a past practice and, accordingly, became part of the parties' agreement. The Arbitrator ordered the parties' to implement this procedure until they are able to reach a new agreement regarding requests for official time. In the Majority's view, this new requirement can be applied prospectively, but only with respect to the grievant. The Majority's conclusion, thus, creates two classes of employees – the Union President, who receives the benefit of this new requirement, and all other employees who request official time, who do not enjoy the benefit of the new requirement. Such inconsistency would not result, however, if the Majority recognized that the Arbitrator's authority was limited in two respects rather than in just one -- to the individual whose requests for official time had been denied and were in dispute and to the period of time covered by the requests.

Finally, I do not mean to suggest that an arbitrator can never order prospective relief. Indeed, one can imagine a stipulated issue that would have warranted the remedy directed by the arbitrator here. For example, the issue could have been stated as:

- "Does the agency violate Article 28.4 of the parties' CBA by demanding that requests for official time provide more detail than is contemplated by the Asterisk Procedure, and if so, what shall be the remedy?" Or,

- "Is the Asterisk Procedure a binding agreement or practice, and has the agency violated it by demanding that requests for official time provide more detail than is required by that Procedure, and if so, what shall be the remedy?" Or,

- "Has the Agency failed to comply with the Hauck Award, and if so, what shall be the remedy?"

Thus, the issue presented to the Arbitrator easily could have justified the imposition of the sort of generalized, prospective remedy that the Arbitrator directed. However, for their own reasons, the parties chose not to submit such an issue.