66 FLRA No. 4

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. BUREAU OF CUSTOMS AND
BORDER PROTECTION
OFFICE OF BORDER PATROL
WASHINGTON, D.C.
(Agency)

0-AR-4700

_____

DECISION

August 12, 2011

_____

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 Jay D. Goldstein 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 Arbitrator found that the Agency violated the parties' collective bargaining agreement (CBA) by failing to provide the Union with notice and an opportunity to bargain over the impact and implementation of a Marine Standardization Manual (MSM).[1] The Arbitrator directed the parties to bargain, but denied the Union's request for a status quo ante remedy. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Awards

The Union filed a grievance alleging, in pertinent part, that the Agency violated the CBA and/or the Statute when it unilaterally implemented the MSM. Award at 2. The grievance was unresolved and submitted to arbitration.

The Arbitrator accepted both parties' proposed statements of the issue, observing that they were "disputed as to form." *Id.* at 2-3, 9. The Union's statement of the issue was:

> Whether the Agency violated the [CBA] . . . and/or [§] 7116(a)(1) and (5) of [the Statute] by unilaterally implementing changes in conditions of employment for . . . employees without first providing the [U]nion with notice and an opportunity to bargain. If so, what is the remedy?

Id. at 2. The Agency asserted that the issue was: "Whether the Agency had a duty to bargain procedures and appropriate arrangements for employees adversely affected by the implementation of the [MSM]? If so, what shall be the remedy?" *Id.*

The Arbitrator found that Article 33(b)(2) of the CBA permits the Union "to raise any claimed violation or misapplication of any law, rule, or regulation that affects conditions of employment in the grievance forum." *Id.* at 9. The Arbitrator also found "that the authority [for this provision] is granted from: . . . [§] 7116(a)(1) and (5) [of the Statute]." *Id.* The Arbitrator then determined the Agency had failed in its "clear obligation" to provide the Union with notice and an opportunity to bargain over the impact and implementation of the MSM. *Id.* at 11-12, 15.

With regard to remedies, the Arbitrator directed the Agency to: (1) bargain over the impact and implementation of the MSM; (2) cease and desist from violating its notice and bargaining obligations in the future; and (3) post a notice. *Id.* With regard to the Union's request for status quo ante relief in the form of the rescission of the MSM, the Arbitrator determined that the MSM resulted from the Agency's review of the "[r]iverine environments" patrolled exclusively by Border Patrol Agents (BPAs).[2] The Arbitrator observed that this review revealed that Vessel Commanders' training, proficiency, and evaluations of BPAs were not uniform within their different sectors and did not conform to a set of national standards critical for deployment to address regional threats. *Id.* at 4-5. In this connection, the Arbitrator noted that the Agency's Office of Air and Marine (OAM) and Office of Border Patrol (OBP)

[1] As discussed further below, we assume, without deciding, that the Arbitrator also found that the Agency violated the Statute.

[2] "Riverine" is defined as "of, relating to, found by, or resembling a river." *Webster's Third New International Dictionary* 1962 (2002). Unlike the BPAs who operate in "riverine environments," the Agency's Office of Air and Marine Agents operate only in open waters and have followed a Marine Standardization Manual since 2006. *See* Exceptions at 3-4.

developed the MSM to avoid fatal accidents that would result from "poor training, poor risk management, [and] inadequate safety gear," and that the MSM provided Vessel Commanders of the OBP with a single source document encompassing instructions, policies, and procedures in all major areas that addressed these concerns. *Id.* at 5. The Arbitrator thus found that a status quo ante remedy rescinding the MSM would: (1) "jeopardize[] employee and public safety"; (2) "increase[] liability for the Agency"; (3) be costly in terms of time and money; and (4) "likely [a]ffect . . . strong national interests and potentially, national security." *Id.* at 10, 12.

In addition, the Arbitrator observed that the Union is the exclusive representative of all nonsupervisory BPAs within the OBP and that these BPAs serve under the organizational umbrella of OAM, functions of which include maritime training, vessel procurement, maintenance, and setting forth safety standards. *Id.* at 4. The Arbitrator then noted that in light of OAM's authority and responsibility, it could disallow BPAs who do not satisfy national training and proficiency standards from operating OAM's vessels, and could ultimately result in an Agency decision to remove the "riverine maritime program" from the bargaining unit and transfer it to OAM. *Id.* at 8, 12. Thus, the Arbitrator found that rescission of the MSM would "negatively affect[] this Union's membership." *Id.* at 12.

For the foregoing reasons, the Arbitrator denied the Union's request for status quo ante relief in the form of rescission of the MSM.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator's denial of status quo ante relief is contrary to law because the Arbitrator failed to evaluate the factors set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*).[3] Exceptions at 8-15. According to the Union, the Arbitrator erroneously based that denial on, among other things: (1) the Agency's argument that a status quo ante remedy might cause unit employees to be removed from the unit and transferred to OAM; and (2) his determination, "without justification or explanation," that such a remedy would cause "'unnecessary expense, a time consuming quagmire and the potential for confusion and possible harmful effects upon the members of this bargaining unit.'" *Id.* at 15 (quoting Award at 15).

B. Agency's Opposition

The Agency argues that the award is not contrary to law. Opp'n at 3, 9-19. Specifically, the Agency contends that the Arbitrator was not required to apply the *FCI* factors because he found a violation under the CBA, not the Statute. *Id.* at 3, 9-11. Additionally, the Agency contends that even if the Arbitrator were required to apply the *FCI* factors, he did so, and the Union's exceptions are no more than disagreement with the Arbitrator's choice of remedy. *Id.* at 3, 11-19.

IV. Analysis and Conclusions

The Union argues that the Arbitrator's denial of a status quo ante remedy is contrary to law. 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. DoD, Dep't's of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*U.S. DoD*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Where the arbitrator finds that a party has committed an unfair labor practice (ULP),[4] the Authority defers to the arbitrator's judgment and discretion in the

[3] The *FCI* factors are: (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. 8 FLRA at 606.

[4] We assume, without deciding, that the Arbitrator found a violation of not only the CBA, but also the Statute. In this connection, although the Agency claims that the Arbitrator found only a contractual violation, the award addresses *both* contractual and statutory violations in the following ways: (1) the Arbitrator accepted the Union's statement of the issue that included both contractual and statutory issues, *see* Award at 2; (2) the award's summary of the positions of the parties included arguments regarding both contractual and statutory issues, *id.* at 7-8; (3) the Arbitrator "noted without dispute, that the authority for [Article 33(b)(2)] is granted from: . . . [§] 7116(a)(1) and (5) [of the Statute]," *id.* at 9; (4) the Arbitrator stated that, in addition to the Union having the burden to prove a contractual violation, "[t]he burden *here* dealt with *statutorily imposed obligations*[,]" *id.* (emphasis added); and (5) the Arbitrator stated that "[b]eyond [the contractual violation], there was an apparent obligation to have negotiated with the Union[,]" *id.* at 11-12.

determination of the remedy. *NTEU*, 64 FLRA 833, 838 (2010); *NTEU*, 48 FLRA 566, 571 (1993). The Authority will not disturb that judgment when there is no basis to conclude that a particular requested remedy is compelled by statute. *NTEU*, 64 FLRA at 838. Further, unless a party establishes that a particular remedy is compelled by the Statute, the Authority reviews remedy determinations of arbitrators in ULP grievance cases just as the Authority's remedies in ULP cases are reviewed by the federal courts of appeals. *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 436 (2010). This means that the Authority upholds the arbitrator's remedy determination unless the determination is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *NTEU*, 48 FLRA at 572 (quoting *NTEU v. FLRA*, 910 F.2d 964, 968 (D.C. Cir. 1990) (en banc)); *NTEU v. FLRA*, No. 10-857, slip op. at 6 (4th Cir. July 26, 2011). The Authority has emphasized that making such a showing "is a heavy burden indeed." *NTEU*, 48 FLRA at 572.

Here, the Arbitrator declined to award a status quo ante remedy because he found that rescinding the MSM's national training and proficiency standards would: (1) subject bargaining unit employees and the public to safety hazards; (2) increase the Agency's liability; (3) subject the Agency to additional costs in time and money; (4) affect national security interests; and (5) negatively affect Union membership because of the likelihood of the Agency's removal of the "riverine maritime program" from the bargaining unit to OAM. Award at 10. The Union does not assert, or provide any basis for finding, that the Arbitrator's remedy determination is a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *NTEU*, 48 FLRA at 572.

In addition, the Union has not demonstrated that the Arbitrator's application of the fifth *FCI* factor – "whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations" -- is deficient. 8 FLRA at 606. In *FCI*, the Authority recognized that whether status quo ante relief is warranted must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption or impairment of the efficiency and effectiveness in government operations that would be caused by such a remedy. *Id.* The Arbitrator's denial of status quo ante relief on the basis that it would be disruptive to the Agency's efficiency and effectiveness in its operations is consistent with these principles. Although the Union argues that the Arbitrator's finding that the rescission of the MSM would be disruptive is speculative, the Union is effectively challenging the Arbitrator's factual findings in this regard. As stated previously, in the Authority's de novo review of an award's consistency with law, the Authority defers to the arbitrator's underlying factual findings.[5] *See U.S. DoD*, 55 FLRA at 40.

Based on the foregoing, we find that the Union has not demonstrated that the Arbitrator erred in denying status quo ante relief. Accordingly, we deny the Union's exceptions.

V. Decision

The Union's exceptions are denied.

[5] We note that the Union does not claim that the award is based on a nonfact.