

**67 FLRA No. 73**

UNITED STATES  
DEPARTMENT OF LABOR  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 12  
(Union)

0-AR-4877

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DECISION

February 27, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

The Agency funds employee performance awards through bonus pools. Arbitrator Salvatore J. Arrigo issued an award finding that the Agency failed to give the Union an opportunity to bargain over the impact and implementation of the Agency's decision to restructure the bonus pools and, as a remedy, ordered the Agency to bargain over the impact and implementation of that decision.

This case presents the Authority with two substantive questions. The first question is whether the Arbitrator exceeded his authority by ordering a remedy when, according to the Agency, he did not find that the Agency violated the parties' agreement. Because the remedy directly responds to the violation that the Arbitrator found, we find that the answer is no. The second question is whether the remedy is contrary to management's right to determine the Agency's budget. Because the remedy does not affect that right, we find that the answer is no.

**II. Background and Arbitrator's Award**

The parties' agreement provides for performance awards and sets minimum and maximum amounts for these awards based on employees' performance ratings. The Agency sets aside a certain percentage of its aggregate payroll for bonus pools that fund these awards.

In 2011, the Agency issued a memorandum addressing budgetary limitations on performance awards for fiscal years (FYs) 2011 and 2012. In response, the Agency restructured employees' performance awards for FYs 2011 and 2012 (bonus decisions). Specifically, the Agency decided to combine General Schedule (GS) manager and non-manager bonus pools into a single bonus pool, and from that bonus pool, provide GS managers larger bonuses, based on a higher percentage of their pay, than non-managers who received the same performance ratings. Senior executives were also provided bonuses based on a higher percentage of pay than non-managers with comparable performance ratings. The Agency issued a memorandum reflecting its bonus decisions and notified the Union of the changes.

The Union then filed an institutional grievance alleging that the Agency violated several provisions of the parties' agreement, as well as various laws. As relevant here, the grievance alleged that the Agency violated the parties' agreement by "awarding larger percentages of income in larger bonus pools to managers and senior executives than to the bargaining[-]unit employees," and by "commingling the bonus pool for . . . bargaining[-]unit employees with that of the managers."<sup>1</sup> The Agency denied the grievance, and the matter was submitted to arbitration. The Arbitrator decided the matter on the parties' joint stipulation of facts, joint exhibits, and briefs.

The Arbitrator determined that the issue submitted for arbitration was "whether the Agency's . . . [m]emorandum providing bonus decisions for FY 2011 and FY 2012 violated the parties' [a]greement and if so, what is the appropriate remedy?"<sup>2</sup> The Arbitrator granted, in part, and denied, in part, the grievance. He found that the Agency had discretion under the agreement to unilaterally allocate money to fund bonus pools for performance awards, and to change the amount of the awards within the confines of the parties' agreement. But the Arbitrator also found that the Agency's decision to restructure the bonus pools had an "impact on the ultimate amount of money available for payment for [bargaining-]unit employee bonuses and ultimately the

<sup>1</sup> Award at 4.

<sup>2</sup> *Id.* at 2.

size of the bonuses.”<sup>3</sup> Therefore, the Arbitrator concluded that the Agency should have provided the Union with an opportunity to bargain over the impact and implementation of that decision, and he ordered such bargaining as a remedy.

### III. Preliminary Matters

- A. The Authority will not consider the parties’ supplemental submissions.

Section 2429.26(a) of the Authority’s Regulations states, in pertinent part, that the “Authority . . . may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate.”<sup>4</sup> Where parties have not requested leave to file supplemental submissions, the Authority has not considered those submissions.<sup>5</sup>

In this case, the Union filed a supplemental submission, and the Agency filed a response to the Union’s submission. But neither party requested leave under § 2429.26(a) of the Authority Regulations to file the supplemental submissions. Accordingly, we do not consider them.

- B. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar certain Agency exceptions.

Several of the Agency’s exceptions (specified below) are premised on one claim: that the Union waited until its brief to the Arbitrator to argue that the implementation of the bonus decisions violated the Agency’s obligation to bargain, and, as a result, this Union argument was not properly before the Arbitrator. However, Authority precedent supports a conclusion to the contrary. Specifically, the Authority has held that where a party does not raise an argument before the arbitrator in response to an argument first raised in an opposing party’s brief to the arbitrator, and there is no basis for finding that the party was precluded from doing so, the party is barred from raising it (for the first time) before the Authority.<sup>6</sup>

There is no dispute that the Union claimed – for the first time in its brief to the Arbitrator – that the Agency violated its obligation to bargain by implementing the bonus decisions. In particular, the Union claimed that: (1) “[t]his case involves management implementing a policy that conflicts with provisions of the collective[-]bargaining agreement without allowing any negotiations over it to take place;”<sup>7</sup> and (2) “[n]o opportunity to bargain over [the decisions] was afforded to the [U]nion.”<sup>8</sup> There also is no dispute that the Union’s brief was filed with the Arbitrator over two weeks prior to issuance of the award. The Agency does not claim, and the record provides no basis for concluding, that it made any attempt during this period to rebut the Union’s claim or request from the Arbitrator an opportunity to do so.

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.<sup>9</sup> Interpreted consistent with *USDA, Farm Service Agency, Kansas City, Missouri*<sup>10</sup> and *U.S. DOJ, Federal BOP, Washington, D.C.*,<sup>11</sup> these regulations bar the Agency’s exceptions concerning the Arbitrator’s finding that it improperly failed to bargain over the impact and implementation of the Agency’s decision to restructure the bonus pools, even though this finding appears to stem from an argument first made in the Union’s brief to the Arbitrator. In particular, we find that §§ 2425.4(c) and 2429.5 bar the Agency’s exceptions alleging that: (1) the award fails to draw its essence from the parties’ agreement because the Union’s duty-to-bargain claim was not raised in accordance with the procedural requirements of the agreement;<sup>12</sup> (2) the award is based on a nonfact because the Arbitrator’s finding that the Union did not have an opportunity to bargain is not true;<sup>13</sup> (3) the Arbitrator exceeded his authority by resolving the impact-and-implementation claim because that issue was not before the Arbitrator;<sup>14</sup> (4) the award is contrary to law because the Arbitrator found a bargaining obligation when the Union had waived its right to bargain by failing to request bargaining after receiving notice of the bonus decisions;<sup>15</sup> and (5) the Arbitrator denied the Agency a fair hearing by

<sup>3</sup> *Id.* at 13.

<sup>4</sup> 5 C.F.R. § 2429.26(a).

<sup>5</sup> *See, e.g., U.S. Dep’t of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 535 n.1 (2010) (declining to consider motion to strike without request for leave to file).

<sup>6</sup> *See USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011) (finding no basis that agency could not have raised argument before the arbitrator where union’s post-hearing brief was filed after the agency’s and nearly a month passed before the arbitrator issued award); *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1152 (2010) (dismissing exception under § 2429.5 where agency failed to demonstrate that it had “no opportunity to respond” to union’s

attorney-fee request first raised in union’s post-hearing brief that was filed simultaneously with the agency’s).

<sup>7</sup> Exceptions, App. A, Union Br. at 5.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> 5 C.F.R. §§ 2425.4(c), 2429.5; *see also AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012); *AFGE, Local 1546*, 65 FLRA 833, 833 (2011).

<sup>10</sup> 65 FLRA 483, 484 n.4 (2011).

<sup>11</sup> 64 FLRA 1148, 1152 (2010).

<sup>12</sup> Exceptions at 9-10.

<sup>13</sup> *Id.* at 10, 11.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.* at 13-14.

considering the Union's duty-to-bargain claim without providing the Agency an opportunity to respond to that claim.<sup>16</sup>

All of the foregoing exceptions relate directly to portions of the award finding that the Agency was obligated to bargain over the impact and implementation of its decision to restructure the bonus pools. The Agency could, and should, have made its arguments to the Arbitrator in response to the claim in the Union's brief to the Arbitrator. As the Agency did not raise these claims below, it may not do so now.

In addition to those claims, the Agency asserts that the award is deficient because: (1) the Arbitrator exceeded his authority by awarding an impact-and-implementation bargaining remedy without finding a violation of the parties' agreement;<sup>17</sup> and (2) the award is contrary to its right to determine its budget under § 7106(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute).<sup>18</sup> As the record does not provide a basis for finding that these two assertions should have been made to the Arbitrator, we address them below.

#### IV. Analysis and Conclusions

- A. The Arbitrator did not exceed his authority by ordering impact-and-implementation bargaining as a remedy.

As stated above, the Agency argues that the Arbitrator exceeded his authority by awarding a remedy without finding a violation of the parties' agreement.<sup>19</sup> 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.<sup>20</sup> As the Agency notes, the Authority has held, in this regard, that an arbitrator exceeded his authority when he concluded that an agency did not violate the parties' agreement, as alleged, but nevertheless provided a remedy to the grievant.<sup>21</sup> However, arbitrators have great latitude in fashioning remedies.<sup>22</sup> Further, that a party did not

request a bargaining order as a remedy provides no basis for setting aside the award.<sup>23</sup>

The Arbitrator found that the Agency should have provided the Union with an opportunity to negotiate concerning the impact and implementation of the bonus decision to restructure the bonus pools.<sup>24</sup> As discussed above, the Agency's exceptions to that finding are not properly before the Authority. Thus, the precedent cited by the Agency is inapposite.<sup>25</sup> In addition, the Arbitrator's remedy is directly responsive to the Arbitrator's finding that the Agency violated its duty to bargain with the Union over the impact and implementation of its decision regarding bonus pools.<sup>26</sup> Accordingly, we find that the Agency has not demonstrated that the Arbitrator exceeded his authority, and we deny the exception.

- B. The award does not affect management's right to determine the Agency's budget.

The Agency argues that the remedy ordered by the Arbitrator is contrary to law because it affects management's right to determine the Agency's budget under § 7106(a)(1) of the Statute.<sup>27</sup> When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.<sup>28</sup> In applying de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.<sup>29</sup> In making that assessment, the Authority defers to the arbitrator's underlying factual findings.<sup>30</sup>

The Authority has applied a two-part test to determine whether an award affects management's right

<sup>16</sup> *Id.* at 16-17.

<sup>17</sup> *Id.* at 11-12.

<sup>18</sup> *Id.* at 14, 16.

<sup>19</sup> *Id.* at 11-12.

<sup>20</sup> *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

<sup>21</sup> *Veterans Admin.*, 24 FLRA 447, 450 (1986); *see also U.S. Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002) (*Naval Sea*).

<sup>22</sup> *U.S. DOJ, U.S. Fed. BOP, U.S. Penitentiary, Lewisburg, Pa.*, 39 FLRA 1288, 1301 (1991).

<sup>23</sup> *Id.*; *see also U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 861-62 (2012) (finding that arbitrator did not exceed his authority when he required the parties to bargain even though union did not request such a remedy).

<sup>24</sup> Award at 13.

<sup>25</sup> *Veterans Admin.*, 24 FLRA at 450 (finding that arbitrator exceeded his authority when he failed to confine his decision, and any possible remedy, to the issues submitted to arbitration as he framed them); *Naval Sea*, 57 FLRA at 688-89 (finding that that arbitrator exceeded his authority by deciding, and awarding a remedy concerning, an issue not submitted to arbitration).

<sup>26</sup> Award at 13.

<sup>27</sup> Exceptions at 14.

<sup>28</sup> *See, e.g., NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).

<sup>29</sup> *See, e.g., NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

<sup>30</sup> *Id.*

to determine its budget under § 7106(a) of the Statute.<sup>31</sup> Under the test, the Authority will find that an award affects an agency's right to determine its budget if: (1) the agency shows that the award prescribes the particular programs to be included in the agency's budget, or the amount to be allocated in the budget;<sup>32</sup> or (2) the agency substantially demonstrates that an increase in costs is significant and unavoidable, and is not offset by compensating benefits.<sup>33</sup>

As for the first part of the test, the award does not prescribe the amount to be allocated in the Agency's budget. In fact, the Arbitrator specifically found that the Agency could unilaterally allocate money to fund bonus pools for performance awards and change the amounts of the awards.<sup>34</sup> With respect to the second part of the test, the Agency neither alleges nor shows that impact-and-implementation bargaining over the bonus-pool decision increases costs to its overall budget. Accordingly, we find that the Agency has failed to show that the award affects management's right to determine the Agency's budget, and we deny this exception.<sup>35</sup>

## V. Decision

We dismiss the Agency's essence, nonfact, and fair-hearing exceptions; and dismiss in part, and deny in part, the Agency's exceeds-authority and contrary-to-law exceptions.

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<sup>31</sup> *AFGE, AFL-CIO*, 2 FLRA 604, 608 (1980) (establishing a two-part test (*Wright-Patterson* test) to determine whether a proposal or provision affects management's right to determine its budget) (*AFGE*); *AFGE, Local 1441*, 61 FLRA 201, 205 (2005) (*Local 1441*) (applying *Wright-Patterson* test to a backpay award and finding that the award did not affect management's right to determine its budget where award did not prescribe amount to be allotted in the agency's budget, and agency failed to demonstrate how award would increase the budget's cost); *U.S. DHS, U.S. CBP*, 61 FLRA 113, 116 (2005) (*DHS*) (applying *Wright-Patterson* test and finding that award did not affect management's right to determine its budget where agency failed to show how much award would cost or how it impacted the overall budget).

<sup>32</sup> *AFGE*, 2 FLRA at 608; *Local 1441*, 61 FLRA at 205; *DHS*, 61 FLRA at 116.

<sup>33</sup> *AFGE*, 2 FLRA at 608; *Local 1441*, 61 FLRA at 205; *DHS*, 61 FLRA at 116.

<sup>34</sup> Award at 13.

<sup>35</sup> *Local 1441*, 61 FLRA at 205.