65 FLRA No. 102

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
AUSTIN, TEXAS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 72
(Union)

0-AR-4178

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DECISION

January 31, 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 an exception to an award of Arbitrator Marsha Kelliher 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 exception.

The Arbitrator sustained the Union's grievance claiming that the Agency violated the parties' collective bargaining agreement (CBA) by limiting the assignment of overtime to Saturdays or Alternative Work Schedule (AWS) days-off.[1]

For the reasons set forth below, we deny the Agency's exception.

II. Background and Arbitrator's Award

Ordinarily, the Agency allowed employees to work overtime before or after the employees' regular work hours, on Saturdays, and on AWS days-off. The maximum amount of overtime the Agency would authorize for an employee was eight hours per week. In August 2005, for a two-week period, the Agency changed its policy concerning when overtime could be worked. For this particular two-week period, the Agency decided that overtime work could be performed only on Saturdays and AWS days-off. The Agency cited its interest in efficiency as the reason for the change.

The Union filed a grievance claiming that this limitation allowed employees on an AWS schedule more opportunities to work overtime than employees on a five-day a week schedule. The Union claimed that this violated Article 24, Section (2)(A)(1) of the parties' CBA, which requires that overtime be distributed "as equitably as possible."[2] Award at 1.

The Arbitrator framed the issue as: "Whether the assignment of overtime only on Saturdays or [AWS] days-off . . . was a violation of Article 24, Section (2)(A)(1) of the [CBA], and if so, what is the appropriate remedy?" *Id.* The Agency argued before the Arbitrator, among other things, that the right to assign work includes the determination of when overtime will be performed. *Id.*

The Arbitrator found that, if the Agency limited overtime to Saturdays or AWS days-off only, then employees on an AWS schedule would have twice the opportunity to work overtime as employees on other schedules. *Id.* at 2. The Arbitrator concluded that the distribution of overtime in this manner would therefore not be "as equitabl[e] as possible[,]" as required by the CBA. *Id.* Accordingly, the Arbitrator ordered that employees not on an AWS schedule be paid for sixteen hours of overtime with interest and attorney fees, less the amount of overtime actually worked, and not to exceed the average number of overtime hours worked per week by the affected employee from January 2005 through June 2005. *Id.*

III. Positions of the Parties

A. Agency's Exception

The Agency claims the award is contrary to law. The Agency contends that the award affects

1. The AWS is a work schedule that allows employees to be off from work one day of the regular five-day work week in return for working longer hours the other four days. Exception at 3.

2. Article 24, Section (2)(A)(1) provides in pertinent part: "Overtime will be distributed as equitably as possible among qualified employees." Opp'n, Attach., CBA at 75.

management's right to assign work under § 7106(a)(2)(B) of the Statute. Exceptions at 2. The Agency also asserts that Article 24, Section (2)(A)(1) of the CBA, as interpreted by the Arbitrator, is not enforceable pursuant to § 7106(b)(3). Specifically, the Agency claims that the CBA provison is not an arrangement because there is no adverse effect to ameliorate. In support, the Agency claims that all employees may work only a maximum of eight hours of overtime a week and the Arbitrator's interpretation of the provision does nothing more than provide employees on a five-day a week schedule more days on which to work overtime. *Id.* at 6. Therefore, the Agency alleges, the Arbitrator's interpretation of the provision at issue does not make the distribution of overtime more equitable. *Id.* at 6-7. Finally, the Agency asserts that Article 24, Section (2)(A)(1) of the CBA, as interpreted by the Arbitrator, is not enforceable pursuant to § 7106(b)(3) because it excessively interferes with management's rights by abrogating its right to assign work. *Id.* at 8-9.

B. Union's Opposition

The Union claims that allowing employees to work overtime during the week is a past practice that allows overtime to be distributed as equitably as possible, as required by the CBA. Opp'n at 3-4. The Union further argues that Article 24, Section (2)(A)(1) of the CBA and the past practice constitute a procedure for assigning overtime negotiated pursuant to § 7106(b)(2) of the Statute. *Id.* at 6-8.

IV. Analysis and Conclusions

The Agency argues that the award is contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute. 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) (*NTEU*) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying this standard, 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.*

The Authority recently revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards. *See U.S. Envtl. Prot. Agency*, 65 FLRA 113, 116-18 (2010) (*EPA*) (Member Beck concurring); *Fed. Deposit Ins. Corp., Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (*FDIC, SF Region*) (Chairman Pope concurring). Under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[3] *Id.* Also, under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right.[4] *See id.* at 116-118. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive-interference standard. *Id.* at 118.

It is undisputed that the award affects management's right to assign work. *See AFGE, Council 215*, 60 FLRA 461, 464 (2004) (the right to assign work under the Statute includes the right to assign overtime and to determine when overtime will be performed). Consequently, we examine whether the Arbitrator enforced a contract provision negotiated under § 7106(b). Here, the Arbitrator enforced Article 24, Section (2)(A)(1) of the CBA. He determined that the Agency violated this provision by inequitably refusing to allow employees on a five-day a week schedule to work overtime during their regular work week before or after their regular work hours.

3. When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.

4. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the contract provision is an appropriate arrangement or whether it abrogates a § 7106(a) right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *FDIC, SF Region*, 65 FLRA at 107; *Soc. Sec. Admin., Dallas Region*, 65 FLRA 405, 408 n.5 (2010); *U.S. Dept of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010); *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010).

The Agency claims that Article 24, Section (2)(A)(1) of the CBA, as interpreted and applied by the Arbitrator, is not enforceable pursuant to § 7106(b)(3) because it is not an arrangement. In the Agency's view, limiting the days on which employees may work overtime does not have an adverse effect on those employees. Exception at 6-8. The standard set by the Authority to decide whether a provision constitutes an arrangement is whether the provision, as interpreted and applied by an arbitrator, ameliorates or mitigates adverse effects that flow from management's exercise of its management rights. *E.g.*, *EPA*, 65 FLRA at 116 (citing *U.S. DOJ, Fed Bureau of Prisons, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406, 410 (2001) (Chairman Cabaniss dissenting)).

The Arbitrator's finding that employees on a five-day a week schedule were inequitably deprived of opportunities to work overtime during their regular work week supports the conclusion that the CBA provision enforced by the Arbitrator constitutes an arrangement. As the Arbitrator's award reflects, the Agency's decision to limit when overtime could be worked adversely affected these employees by significantly reducing their overtime work opportunities. Further, the Arbitrator's interpretation and application of the CBA provision has the effect of restoring those opportunities. Therefore, the Arbitrator's interpretation of Article 24, Section (2)(A)(1) ameliorates the adverse effects flowing from the exercise of management's right to assign the work. *EPA*, 65 FLRA at 116. Consequently, the Agency's assertion provides no basis for finding that the award does not enforce an arrangement.

The Agency also claims that Article 24, Section (2)(A)(1) of the CBA, as interpreted and applied by the Arbitrator, is not enforceable pursuant to § 7106(b)(3) because it excessively interferes with management's rights by abrogating management's right to assign work. Exception at 8-9. As stated above, the Authority no longer applies an excessive-interference standard in determining whether an arbitrator has enforced a contract provision negotiated under § 7106(b)(3); rather, it applies an abrogation standard. *EPA*, 65 FLRA at 116-18. The Authority has previously described an award that abrogates the exercise of a management right as an award that "precludes an agency from exercising" the right. *U.S. Dep't of the Army, Army Transp. Ctr., Fort Eustis, Va.*, 38 FLRA 186, 190 (1990) (quoting *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 314 (1990)).

The Agency fails to demonstrate that Article 24, Section (2)(A)(1), as interpreted and applied by the Arbitrator, abrogates the exercise of the right to assign work. The Arbitrator did not interpret the provision to prevent management from assigning overtime. Article 24, Section (2)(A)(1), as applied by the Arbitrator, merely requires that overtime be distributed "as equitably as possible." Award at 2. Such a limitation, making equity a requirement in the assignment of overtime, does not preclude the Agency from exercising its right to assign work.

Based on the foregoing, the Agency has not shown that, as interpreted and applied by the Arbitrator, Article 24, Section (2)(A)(1) abrogates management's right to assign work. Accordingly, we find that the award is not contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute.[5]

V. Decision

The Agency's exception is denied.

5. In view of this conclusion, we do not address whether the proposal constitutes a procedure under §7106(b)(2) of the Statute.