65 FLRA No. 110

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1760
(Union)

0-AR-4320

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DECISION

February 16, 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 John B. Dorsey 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 found that the Agency violated the parties' national agreement (the agreement) by terminating the Local Union President's (the President's) access to certain aspects of the Agency's electronic communications system (the system) when he retired.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The President retired from the Agency, but continued to serve in his representational role as President. Award at 3. When he retired, the Agency terminated his access to the system, including the Agency's intranet and electronic mail (e-mail), as well as the Official Union Time Tracking System (OUTTS), which tracks Union officials' use of official time. *Id.*

A grievance was filed regarding this termination of access. *Id.* When the grievance was not resolved, it was submitted to arbitration, where the parties stipulated the issues, in pertinent part, as follows: "Did the [Agency] violate the . . . agreement when it terminated access of the . . . President to the . . . system, intranet, [e]-mail, and [the OUTTS]? If so, what shall be the remedy?" *Id.*

The Arbitrator noted that Article 4, Section 4 of the agreement provides that, when management proposes certain changes, the Agency must notify the Union electronically, and the Union must respond electronically.[1] *Id.* at 3-4. In addition, the Arbitrator found that Article 11, Section 9.A.8. of the agreement is "clear on its face[]" and provides the President the right to use the Agency's e-mail system to communicate with employees in the Local.[2] Award at 7.

The Arbitrator noted the Agency's claim that Article 11, Section 9.A.1. of the agreement requires the Union to comply both with Agency policies, including the Agency's Information Systems Security Handbook (the Handbook), and with a related Memorandum applying to the particular region where the President worked (the Memorandum), which

1. Article 4, Section 4 of the agreement provides, in pertinent part, that "[t]he designated Management representative will provide the designated Union representative with timely electronic notice of the Management initiated change(s) to a union-designated electronic mail box[,]" and "[t]he Union will request consultations and or negotiations . . . by submitting its request to a management designated electronic mailbox." Award at 3-4.

2. Article 11, Section 9.A. of the agreement provides, in pertinent part, that the Agency

> agrees to provide the Union with access to and use of the Agency's electronic mail subject to the following restrictions:
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> 1. The Union agrees its access and use will comply with applicable government-wide and Agency policies and guidelines and the [agreement].
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> . . . .
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> 8. . . . [T]he [U]nion agrees that an e-mail message, with the exceptions noted below, will be transmitted to not more than 100 recipients at one time[.] . . . A Local president or a designee, however, is authorized to send one e-mail per week to each employee in his/her Local[,] in excess of the 100 recipient limit.

Exceptions, Attach., Ex. 5 at 11-5 - 11-6.

provide for terminating access to the system when employees depart the Agency.[3] Award at 7-8. Addressing that claim, the Arbitrator found that Section 9.A.1. "is hardly an example of clear contract language[,]" and that it "pledges the Union to comply with" the agreement, which "requires the Local President to use the [e]-mail system." *Id.* at 8. The Arbitrator also found that the Union is entitled to determine who will be its designee under the agreement, and that the President is entitled to serve in that role, despite his retirement. *Id.* Accordingly, the Arbitrator found that "the Agency must provide him with electronic notices of changes[,] and he must reply to management's electronic mail box." *Id.*

In addition, the Arbitrator noted that the parties had signed a Memorandum of Understanding regarding the OUTTS (the OUTTS MOU), and that Section 3 of the OUTTS MOU provides, in pertinent part, that "Local presidents and/or their designees shall have access to" the OUTTS. *Id.* at 5. The Arbitrator -- citing the parol evidence rule that prohibits, in certain circumstances, consideration of evidence extrinsic to a written agreement -- rejected the Agency's reliance on bargaining history to demonstrate that the OUTTS MOU was not intended to apply to retired individuals. *See id.* at 8-9.

Further, the Arbitrator addressed the Agency's claim that granting the President limited use of its system would compromise "the security of its entire electronic communications . . . ." *Id.* at 9. The Arbitrator determined that the Agency "presented no proof to back up that assertion." *Id.* In addition, the Arbitrator stated that it was undisputed that, "over his many years as a full time Union [o]fficial[,]" the President had limited access to the system, and "[t]here was not a single claim [that] it resulted in any security breach." *Id.* The Arbitrator also stated that "the Agency has not been consistent in applying what it maintains is an unbending policy[,]" because it has permitted another retired Union representative to continue using the system, and that the Agency "provided no explanation as to why [the President] should not be afforded equal treatment." *Id.*

Based on the foregoing, the Arbitrator concluded that the Agency violated the agreement when it terminated the President's intranet, e-mail, and OUTTS access. *Id.* As a remedy, he directed the Agency to restore that limited access. *Id.* at 10.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to management's right to determine its internal security practices under § 7106(a)(1) of the Statute because it interferes with the Agency's internal security policy--set forth in the Handbook and the Memorandum -- of terminating employees' access to the system when they retire. Exceptions at 4, 6-7. According to the Agency, this policy is reasonably linked to its goal of safeguarding the system, which maintains personally identifiable information of every United States citizen. *Id.* at 8. Also according to the Agency, this policy is based on two principles: (1) "need to know[,]" i.e., the Agency grants system access only to employees; and (2) "least privilege[,]" i.e., even employees have access only to the information that they need in order to perform their jobs. *Id.* at 7. The Agency asserts that "proposals prescribing the actions management will take to ensure the security of its computer system directly interfere with" that management right. *Id.* at 5 (quoting *AFGE, Local 1712*, 62 FLRA 15, 17 (2007) (*Local 1712*)).[4] In addition, the Agency contends that the Arbitrator erred by finding that, merely because the President's prior access did not result in security breaches, there would be no security risk associated with his continued access. *Id.* at 8. With regard to the Arbitrator's finding that the policy has not been consistently applied, the Agency asserts that, although thousands of employees leave the Agency each year, the Union was able to cite only one example of a retiree who continued to have access -- and that situation was "pursuant to a specific negotiated agreement, and thus her access has been grandfathered in." *Id.* at 9. Further, the Agency also asserts that the Arbitrator was not enforcing an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute. *Id.* at 10-11.

The Agency also argues that the award is contrary to the Handbook, which the Agency claims is a "rule" within the meaning of § 7122(a)(1) of the

3. The Handbook provides, in pertinent part: "Security officers should immediately deactivate the [personal identification numbers (PINs)] of employees who have departed the [A]gency . . . ." Exceptions, Attach., Ex. 6, Ch. 2.0 at 2 (emphasis omitted). The Memorandum directs Agency managers to complete a clearance form when employees leave the Agency, and lists "PIN deactivation[]" as a responsibility of the Agency's Center for Security and Integrity. Exceptions, Attach., Ex. 7 at 1.

4. Although the Agency cites "61 FLRA No. 6," Exceptions at 5, it appears that the Agency intended to cite *Local 1712*.

Statute because it was developed as a result of, and in order to bring the Agency into compliance with, various statutes and regulations.[5] *Id.* at 12.

Further, the Agency contends that the award fails to draw its essence from the agreement and the OUTTS MOU. With regard to the agreement, the Agency argues that the award "ignores" the wording in Article 11, Section 9.A.1. requiring that access to the system be consistent with, among other things, Agency policies. *Id.* at 14. With regard to the OUTTS MOU, the Agency contends that the Arbitrator's interpretation of that MOU is not plausible because the MOU does not provide an exhaustive list of who is excluded from computer access, and the Arbitrator ignored bargaining history evidence indicating that retired employees were intended to be excluded from access. *Id.* at 15.

B. Union's Opposition

The Union argues that the award is not contrary to management's right to determine internal security practices. Opp'n at 5. Specifically, the Union contends that the Agency failed to demonstrate a "link or reasonable connection" between its internal security objectives and its decision not to allow the grievant limited access to the system. *Id.* In this regard, the Union asserts that the Arbitrator directed reinstatement of the President's access to only e-mail, the intranet, and the OUTTS, and that the President would not have access to any secure data. *Id.* at 5-6. The Union also asserts that the Agency has applied its practice inconsistently. *Id.* at 6. Further, the Union contends that the Arbitrator was enforcing appropriate arrangements within the meaning of § 7106(b)(3) of the Statute, or, alternatively, contract provisions involving the technology, methods or means of performing work, within the meaning of § 7106(b)(1) of the Statute. *Id.* at 9-10.

With regard to the Agency's reliance on the Handbook, as an initial matter, the Union asserts that the Agency did not argue before the Arbitrator that the Handbook is a "rule" within the meaning of § 7122(a)(1) of the Statute and that, consequently, this argument must be dismissed under 5 C.F.R. § 2429.5.[6] *Id.* at 11. In addition, the Union claims that the award is not contrary to the plain wording of the Handbook. *Id.* at 10. In any event, the Union argues that the parties' agreement trumps any contrary Agency-wide regulations, and asserts that when an agreement incorporates the regulations with which an award allegedly conflicts, the matter becomes one of contract interpretation. *Id.* at 11.

Finally, the Union argues that the award draws its essence from the agreement and the OUTTS MOU. According to the Union, the Agency disputes the Arbitrator's "reasoned interpretation of the Agency regulations as incorporated into" the agreement. *Id.* In addition, the Union contends that the Agency has not demonstrated that the Arbitrator erred by relying on the parol evidence rule when he interpreted the OUTTS MOU. *Id.* at 13.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency alleges that the award is contrary to § 7106(a)(1) of the Statute and the Handbook. The Authority reviews questions of law 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 a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. Section 7106(a)(1) of the Statute

The Authority recently revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring). Under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted

5. Specifically, the Handbook cites: (1) the "Federal Information Security Management Act of 2002 (FISMA)"; (2) the "Clinger Cohen Act of 1996"; (3) the "Freedom of Information Act of 1996"; (4) the "Federal Managers' Financial Integrity Act (FMFIA) of 1982"; (5) the "Privacy Act of 1974"; (6) "Records management by Federal Agencies (44 U.S.C. Ch. 31)"; (7) "Office of Management and Budget (OMB) Circulars A-123, A-127, and A-130"; and (8) "IRS Tax Information Security Guidelines for Federal, State and Local Agencies[.]" Exceptions, Attach., Ex. 6 at 1-2. The Agency does not contend that the award is contrary to these cited provisions.

6. The pertinent wording of 5 C.F.R. § 2429.5 is set forth below.

management right. *EPA*, 65 FLRA at 115.[7] If it does not, then the Authority denies the exception. *E.g.*, *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 (2010).

Management's right to determine its internal security practices under § 7106(a)(1) of the Statute includes the right to determine the policies and practices that are part of an agency's plan to secure and safeguard its personnel, property, and operations. *E.g.*, *U.S. DHS, Customs & Border Prot. Agency, N.Y., N.Y.*, 61 FLRA 72, 76 (2005) (then-Member Pope concurring). Where an agency establishes a link or reasonable connection between the agency's goal of safeguarding personnel or property, or preventing disruption of agency operations, and the disputed practice, the Authority will find that the practice constitutes the agency's exercise of its right to determine its internal security practices. *Id.*

Here, the Arbitrator noted the Agency's claim that granting the President limited use of the system would compromise "the security of its entire electronic communications[,]" but he determined that the Agency "presented no proof to back up that assertion." Award at 9. The Agency does not argue that this factual finding is based on a nonfact, and, as stated previously, in assessing whether an arbitration award is contrary to law, the Authority defers to an arbitrator's factual findings. *E.g.*, *Local 1437*, 53 FLRA at 1710. In addition, although the Agency emphasizes the sensitivity of the information contained in the system, the Agency does not assert that granting the President access to the system for very limited reasons -- specifically, intranet, e-mail, and the OUTTS -- would allow the President to access that sensitive information. In these circumstances, we find that the Agency has not established a link or reasonable connection between its goal of safeguarding this information and its practice of disallowing all retired employees, including the President, access to its intranet, e-mail, and the OUTTS. *Cf. Local 1712*, 62 FLRA 15, 17-18 (in negotiability case, agency established reasonable connection between security objective of safeguarding computer equipment and policy of keeping door to information technology office open). Accordingly, we find that the award does not affect management's right to determine its internal security practices and, therefore, we deny the Agency's management rights exception.[8]

2. The Handbook

As an initial matter, the Union argues that the Authority should not consider the Agency's claim that the award is contrary to "rule" because the Agency did not characterize the Handbook as a "rule" before the Arbitrator. Opp'n at 11. The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[9]

Before the Arbitrator, the Agency argued that the Handbook required termination of the President's access to the system. Exceptions, Attach., Ex. 2, Post-Hearing Brief at 1-2. Although the Agency did not specifically characterize the Handbook as a "rule or regulation," there is no dispute that the Handbook is an Agency regulation. Agency regulations are, as a matter of law, "rule[s] or regulation[s]" within the meaning of § 7122(a) of the Statute. *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 192 (1990). In addition, the Union points to no requirement that a party specifically characterize an Agency regulation as a "rule or regulation" before an arbitrator in order for the party to preserve its ability to later challenge the arbitrator's award as contrary to rule or

7. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the award affects the exercise of the asserted management 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); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 462 n.2 (2011); *Soc. Sec. Admin., Dallas Region*, 65 FLRA 405, 408 n.5 (2010); *U.S. Dep't 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). Member Beck would conclude that the Arbitrator's award is a plausible interpretation of the parties' agreement and deny the exception.

8. Accordingly, it is unnecessary to resolve whether the Arbitrator was enforcing provisions negotiated under § 7106(b)(1) and (b)(3) of the Statute.

9. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions in this case were filed before that date, we apply the prior Regulations.

regulation. *Cf. U.S. Dep't of Veterans Affairs, G.V. (Sonny) Montgomery VA Med. Ctr., Jackson, Miss.*, 65 FLRA 27, 29 (2010) (in dismissing exception on ground that agency did not challenge requested remedies as inconsistent with "[a]gency directives" before arbitrator, Authority did not address whether agency failed to properly characterize agency directives as laws, rules, or regulations). Consistent with the foregoing, we find that the Agency is not precluded from arguing that the Handbook is a rule or regulation within the meaning of § 7122(a) of the Statute.

Addressing the merits of the Agency's exception, when a collective bargaining agreement incorporates the agency regulation with which an award allegedly conflicts, the matter becomes one of contract interpretation because the agreement, not the regulation, governs the matter in dispute. *E.g.*, *AFGE, Council of Prison Locals 33*, 59 FLRA 381, 382 (2003). The Authority has found that where, "as plainly worded and interpreted by the [a]rbitrator," a collective bargaining agreement provides that certain matters are required to be conducted in accordance with an agency regulation, "the agreement effectively incorporates" the regulation. *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 51 FLRA 1210, 1216-17 (1996) (*APHIS*).

Here, the Agency argues that the award is contrary to the Handbook. Specifically, the Agency claims, and there is no dispute, that the agreement requires that Union access to the system be consistent with Agency policies, including the Handbook. In these circumstances, consistent with *APHIS*, we consider the Handbook "effectively incorporate[d]" into the agreement, and we treat the matter as "one of contract interpretation[,]" *id.* Accordingly, below we apply an "essence" analysis to assess the Agency's argument.

B. The award does not fail to draw its essence from the parties' agreements.

The Agency challenges the Arbitrator's interpretation of the agreement and the OUTTS MOU. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard 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. *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.

With regard to the agreement, Article 11, Section 9.A. provides, in pertinent part, that the Agency "agrees to provide the Union with access to and use of the Agency's electronic mail subject to [certain] restrictions[.]" Exceptions, Attach., Ex. 5 at 11-5. One restriction, as the Arbitrator acknowledged, is Section 9.A.1., which provides that the Union's access to the system "will comply with applicable . . . Agency policies and guidelines in the [agreement]." *Id.* As discussed previously, the Arbitrator found Section 9.A.1. to be "hardly an example of clear contract language[,]" and noted that it required the Union to comply with not only Agency policies such as the Handbook, but also other provisions of the agreement -- including Article 4, Section 4, which "requires the Local President to use the [e]-mail system[]" to respond to management-proposed changes. Award at 8. Further, the Arbitrator found that, unlike Section 9.A.1., Section 9.A.8. -- which pertinently provides that "[a] Local president or a designee . . . is authorized to send one e-mail per week to each employee in his/her Local[,]" Exceptions, Attach., Ex. 5 at 11-6 -- is "clear on its face[]" and provides the President the right to use the Agency's e-mail system to communicate with unit employees. Award at 7. In these circumstances, the Agency has not demonstrated that the Arbitrator's finding that the parties' agreement entitles the President to continued, limited access to the system is irrational, unfounded, implausible, or a manifest disregard of the agreement.

With regard to the OUTTS MOU, the Agency asserts that the MOU does not exhaustively list every category of individual whose access is not permitted, and that the Arbitrator should have relied on evidence of bargaining history that indicates that retired employees were intended to be excluded. In effect, the Agency challenges the Arbitrator's decision, based on the Arbitrator's application of the parol evidence rule, not to rely on evidence of bargaining history. The Authority has held that exceptions

contending that an arbitrator should, or should not, use parol evidence do not provide a basis for finding an award deficient. *NTEU*, 63 FLRA 299, 300 (2009). Consistent with this precedent, we conclude that the Agency's argument does not provide a basis for finding that the Arbitrator's interpretation of the OUTTS MOU fails to draw its essence from that MOU.

For the foregoing reasons, we deny the Agency's essence exceptions.

V. Decision

The Agency's exceptions are denied.