

64 FLRA No. 144

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1263
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
DEFENSE LANGUAGE INSTITUTE
MONTEREY, CALIFORNIA
(Agency)

0-AR-4551

DECISION

May 21, 2010

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 Daniel F. Altemus 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 exception.

The Arbitrator denied a grievance alleging that the Agency violated the parties' agreement and the Statute when it implemented an Agency regulation concerning pay for bargaining unit employees. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency operates under the Department of Defense (DoD) and provides foreign language instruction to members of the military. Award at 3. The Agency employs civilian faculty who are represented by the Union. *Id.*

The DoD has a separate compensation system -- the Faculty Pay System (FPS) -- for its civilian

faculty.¹ This pay system is implemented by the Defense Language Institute, Foreign Language Center Regulation Number 690-1 (Regulation 690-1). The Agency notified the Union of its "intent to renegotiate, amend, and/or modify [Regulation 690-1]" and, on June 11, 2008,² provided the Union with a copy of the draft revised regulation. *Id.* at 7, 9.

By memorandum dated June 12, the Agency invited the Union to meet on June 13 "to clarify any questions" that it had about the proposed revision. *Id.* at 9. The Agency also advised the Union that the "time limits for Union consideration as provided in Article 10, Section 2" would begin after June 13.³ *Id.* at 9-10. The Agency further noted that it "agreed to extend the time limits of Article 10, Section 2 until the close of business on 3 July[.]" *Id.* at 10.

The June 13 meeting did not occur. The Union did not submit any proposals on or before July 3 or request an extension of time in which to respond. *Id.* at 10. On June 30, the Union President informed the Agency that he would be on leave from July 1 to 8 and identified a designee to serve during his absence. The Union designee did not respond to the Agency's request. *Id.*

1. The title of this policy was eventually changed to the Faculty Personnel System. Award at 3 n.1. Both titles refer to the same pay system.
2. Hereinafter, the date refers to the year 2008, unless otherwise noted.

3. In pertinent part, Article 10 provides as follows:

Section 1. *Subjects Appropriate for bargaining.* Subjects appropriate for bargaining between the Parties during the life of this Agreement are:

....

B. Management proposals for new or modified personnel policies, practices and matters affecting working conditions of employees.

Section 2. *Notice.* Prior to the implementation of any new or modified policy or regulation, the [Agency] will give at least 10 working days advance written notice to the Union President or his designee. Negotiations will commence within 5 days of management's receipt of Union's request for negotiations unless otherwise mutually agreed upon by the parties.

....

Award at 3.

On July 8, the Agency confirmed that the Union had not requested negotiations and advised that the revised regulation would be implemented on July 15. *Id.* On his return, the Union President orally requested an extension of time to submit proposals and commence negotiations, which the Agency denied. The parties then exchanged communications. *Id.* at 11. The Agency maintained that “the Union had, in effect, waived its contractual right to negotiate over the impact and implementation” of the revised regulation. *Id.* The Union disagreed, asserting that Article 10 did not specify a specific timeline for the Union to request negotiations. *Id.* at 12.

The Agency indicated that it intended to implement the revised regulation on July 15, but expressed that it was willing to meet with the Union on July 14 to discuss its concerns “outside the negotiation process.” *Id.* at 10. The parties met, and the implementation date was changed to August 18. *Id.* at 11.

The Union then filed a grievance. *Id.* at 12. The matter was unresolved and was submitted to arbitration. The Arbitrator framed the issue as: “In the circumstances of this matter, was the [Agency’s] refusal to bargain with the Union prior to its August[] 2009 implementation of an amended Regulation 690-1 a violation of the [parties’] [a]greement and/or the applicable labor statute and, if so, what is the appropriate remedy?” *Id.* at 2. The Arbitrator stated that the issue involved two questions: (1) whether the Union was entitled to bargain over the substantive revisions to Regulation 690-1 and whether the Agency’s refusal to engage in such bargaining constituted a violation of the Statute; and (2) assuming that it was not, did the Agency violate the parties’ agreement and the Statute by its refusal to engage in negotiations regarding the impact and implementation of the revised regulation. *Id.* at 16.

The Arbitrator addressed the first question and found that the Union’s claim -- that the Agency’s refusal to bargain over substantive provisions of the revised regulation violated the Statute and the parties’ agreement -- was not supported by the record evidence. The Arbitrator, thus, denied this part of the grievance.

The Arbitrator determined that the second question concerned the parties’ conflicting interpretations of the requirements of Article 10. *Id.* at 18. The Arbitrator first found that the evidence was insufficient to establish a past practice concerning the parties’ application of Article 10.

The Arbitrator then examined the language of the parties’ agreement. The Arbitrator found that Section 2 “must be viewed in the context of the entire Article 10,” which is “strictly devoted” to “[n]egotiations.” *Id.* at 20. The Arbitrator found that Section 1 identifies “appropriate subjects for negotiations” and includes, among the items listed, “Management proposals for . . . new policies.” *Id.* According to the Arbitrator, Section 2 “requires at least 10 working days notice prior to implementation.” *Id.* The Arbitrator noted that to “interpret this sentence as anything other than an invitation to request negotiations on the change renders it meaningless.” *Id.* The Arbitrator determined that this interpretation was reinforced by the second sentence in Section 2 which specifies the time period in which requested negotiations will commence. *Id.*

The Arbitrator, accordingly, rejected the Union’s assertion that Section 2 does not trigger a time period in which negotiations must be requested and found that the Union’s contention that the Agency violated the parties’ agreement by its interpretation and application of Article 10, Section 2 was unsupported by the record evidence. *Id.* at 19, 21. The Arbitrator determined that the June 12 memorandum “afforded [the Union] a clear and unequivocal opportunity to request negotiations over the impact and implementation” of the revised regulation, but that the Union failed to respond within the extended time period offered by the Agency. *Id.* at 21. According to the Arbitrator, the time period to request negotiations “was established under a reasonable and justifiable interpretation of Article 10 . . . whereby the issuance [of] the required notice of an impending change establishes a window of time in which the Union can request negotiations over that change.” *Id.* Accordingly, the Arbitrator denied the grievance.

III. Positions of the Parties

A. Union’s Exception

The Union asserts that the award fails to draw its essence from the parties’ agreement. The Union contends that the Arbitrator’s interpretation of Article 10 cannot in any rational way be derived from the agreement. The Union asserts that, because the Agency failed to provide an implementation date in its June 12 notice, the notice was “flawed.” Exceptions at 6. The Union asserts that “the key to whether the Union is timely in its request for negotiation[s]” is the date on which the Agency proposes to implement its new or modified policy or regulation. *Id.* at 5. The Union contends that the timeliness of its request for negotiations cannot be

“unilaterally determined by the Agency setting an arbitrary date” for its response. *Id.* at 6. According to the Union, it requested negotiations on July 12, well in advance of the August 18 implementation date. The Union contends that this fact “would seem to be crucial” to the Arbitrator’s decision, but was ignored. *Id.*

The Union asserts the Arbitrator did not “fully consider the language of Article 10[,] Section 2” and that the award, therefore, fails to draw its essence from the agreement. *Id.*

A. Agency’s Opposition

The Agency asserts that the award shows that the Arbitrator fully considered the language of Article 10, Section 2. The Agency disputes the Union’s claim that the Arbitrator “ignored that the [U]nion requested negotiations on July 12” and claims that, rather than ignoring this fact, the Arbitrator “found it irrelevant[.]” Opp’n at 6.

The Agency contends that the Arbitrator found the Agency’s interpretation of Article 10 to be reasonable and justifiable. *Id.* at 6 & 7. The Agency asserts that the Union has not presented any argument that demonstrates that the award is not rationally derived from the contract language. *Id.*

IV. Analysis and Conclusion

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.

The Union contends that its response to the Agency’s June 12 notice concerning proposed revisions to Regulation 690-1 was not untimely under Article 10, Section 2 because the time requirement in this section is triggered only after the Agency has provided an implementation date. According to the Union, because the Agency failed to provide this date in its June 12 notice, the Arbitrator’s determination that the Union failed to meet the time requirements of Article 10, Section 2 cannot in any rational way be derived from the parties’ agreement.

The Union has not demonstrated that the award is deficient on this ground. Article 10, Section 2 of the parties’ agreement provides that, prior to the implementation of any new or modified policy or regulation, the Agency will give at least ten working days advance written notice to the Union President or his designee. *See* Award at 3. (“Prior to the implementation of any new or modified policy or regulation, the [Agency] will give at least 10 working days advance written notice to the Union President or his designee”). The Arbitrator interpreted this provision and found that Section 2 “requires at least 10 working days notice prior to implementation” and that the issuance of the Agency’s June 12 notice of the “impending change” in Regulation 690-1 “establishe[d] a window of time in which the Union” could have requested negotiations. Award at 20 & 21.

The Union has not demonstrated that this interpretation cannot be derived from the parties’ agreement. The notice requirement in Article 10, Section 2 does not contain any wording that specifically indicates that the time limit for the Union’s response is triggered only after an implementation date has been provided by the Agency. As such, the Union has not established that the Arbitrator’s interpretation of the parties’ agreement cannot in any rational way be derived from the agreement, does not represent a plausible interpretation of the agreement, or evidences a manifest disregard of the agreement. As a result, the Union’s exception provides no basis for finding that the award fails to draw its essence from the parties’ agreement.

V. Decision

The Union’s exception is denied.