64 FLRA No. 180

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4335

_____

DECISION

June 25, 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 exceptions to an award of Arbitrator M. David Vaughn 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 sustained in part and denied in part the Union's grievance alleging that the Agency committed an unfair labor practice (ULP) and violated the parties' national agreement (agreement) by insisting on bargaining, at the national level, outside of term negotiations over incentive pay and local alternative work schedule agreements. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The parties' agreement provided that the agreement would expire on June 30, 2006, unless a successor agreement was in place by July 1, 2006. Award at 2. If, upon expiration of the agreement, no new agreement was in place, the Agency would be obligated to continue to observe those provisions that addressed mandatory subjects of bargaining until bargaining for a new agreement was completed. *Id.* at 3. The Agency could, however, withdraw from any provisions that were the result of permissive bargaining. *Id.*

Moreover, under the agreement, the parties could reopen up to five articles of the agreement. The parties reopened Article 18, which involved incentive pay, and Article 23, which addressed Alternative Work Schedules (AWS). *Id.* Regarding incentive pay, the parties agreed to continue the existing program until the agreement expired. Award at 4. Regarding AWS, the parties added Subsection 2.B to Article 23. Under that provision, the parties agreed, among other things: (1) "to meet and discuss, but not negotiate, a plan that would replace local AWS agreements with [an Agency-wide] AWS agreement;" (2) that the local agreements would remain in effect until the national discussions produced an agreement to replace them; and (3) that, if such an agreement was not reached after six months, the parties could reopen and renegotiate the local AWS agreements at the local level. *Id.* at 5.[1]

On April 23, 2006, the Agency informed the Union that it wished to make changes to incentive pay that would take effect immediately after the agreement expired. *Id.* at 4. The Union objected, asserting that the incentive pay program was covered by the agreement and, therefore, had to be continued following expiration of the agreement. *Id.* However, the Union engaged in incentive pay negotiations with the Agency under protest. *Id.*

The agreement expired on June 30, 2006. *Id.* at 7. On that day, the Agency notified the Union that, beginning on July 1, 2006, it would continue to honor the mandatory procedures and arrangements of the expired agreement, but would withdraw from certain

1. Article 23, Subsection 2.B. provides, in relevant part, that:

> 1. The parties agree to meet and discuss, but not negotiate, a plan that would replace local AWS agreements with [an Agency-wide] AWS agreement . . . .
>
> 2. . . . Until the discussions produce a voluntary agreement to replace local AWS agreements, the local agreements in place at the outset of the National Agreement will remain in place . . . .
>
> 4. However, at the end of the six (6) month process described above, either party may open negotiations at the local level over local AWS agreements pursuant to Article 47 [Mid-Term Bargaining] . . . .

J.E. 2 at 86.

permissive subjects of bargaining, including all local bargaining. *Id.*; Joint Ex. (J.E.) 5. Among the subjects of permissive bargaining that the Agency identified as withdrawn were "any provisions from the [agreement] that involve local bargaining" and Article 23, Subsection 2.B.4. J.E. 5, Attach. 1 at 2 & 7. The Agency also noted that negotiations regarding AWS coverage would occur only at the national level. Award at 7.

In October 2006 and January 2007, the Agency informed the Union that it wished to negotiate changes to various AWS local agreements at the national level. *Id*. at 5. The Union objected, asserting that AWS, as a mandatory subject of bargaining, remained in effect as a past practice, pending negotiations of a successor agreement, and could not be negotiated on a piecemeal basis. *Id*. at 6. In response, the Agency stated that it was simply following the procedures in Article 23, Subsection 2.B.4. for renegotiating the local AWS agreements at the end of the six-month discussion period. *Id.* The Union engaged in AWS negotiations with the Agency under protest. *Id*.

The Union filed a grievance, which the Agency denied. The Union then invoked arbitration. *Id.* at 7. The parties stipulated to the following two issues:

> 1. Did the Agency violate the [agreement] when it insisted that the Union engage in negotiations over the Incentive Pay Program and the [AWS] Program outside of term negotiations? If so, what is the remedy?
>
> 2. Did the Agency commit one or more unfair labor practices in violation of 5 U.S.C. § 7116(a)(1), (5), and (8) when it insisted that the Union engage in negotiations over the Incentive Pay Program and the AWS Program outside of term negotiations? If so, what is the remedy?

Id. at 2.

The Arbitrator ruled that the resolution of the grievance depended on whether incentive pay and AWS were covered by the expired agreement. *Id*. at 18. The Arbitrator determined that, if the issues were covered by the agreement, they could not be bargained outside of term negotiations. *Id*.

The Arbitrator first determined that incentive pay was not covered by the agreement. Accordingly, he held that the Agency did not violate the agreement or commit a ULP when it insisted on bargaining over changes to incentive pay outside the framework of negotiations for a successor agreement. *Id*. at 20.

The Arbitrator found, however, that the local AWS agreements were covered by the expired agreement. Accordingly, he held that the Agency engaged in bad faith by insisting on bargaining over changes to these agreements at the national level outside the context of term bargaining. *Id*. at 20-22. In reaching this determination, the Arbitrator noted that Subsection 2.B.4. -- which permitted either party to open negotiations at the local level over local AWS agreements following the conclusion of the six-month discussion period -- appeared to be "of little relevance." *Id*. at 21. That provision, according to the Arbitrator, "simply provided the necessary authorization for such local negotiations[,]" and expired upon the expiration of the agreement. *Id*. at 21-22.

The Arbitrator found "not persuasive" the Agency's argument that any finding that the Agency cannot propose changes to local AWS agreements would violate 5 U.S.C. § 6122(a). Award at 22. The Arbitrator explained that his award would not prohibit the Agency from proposing changes; it would only prohibit the Agency from insisting that negotiations over AWS proceed separately from negotiations over a successor agreement. *Id*.

As a remedy, the Arbitrator ordered the Agency to cease and desist from requiring the Union to bargain over local AWS agreements outside of term bargaining, post notices admitting to a violation of the Statute, and pay five-eighths of the Arbitrator's fees and costs. *Id*. at 23-24.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator's conclusion that matters contained in an expired agreement cannot be negotiated outside of term bargaining is contrary to law. Exceptions at 17. In support of its contention, the Agency cites an Authority decision permitting an agency to initiate bargaining, outside of the context of term bargaining, over the impact and implementation of the exercise of management rights under § 7106 of the Statute that are embodied in an expired term agreement. *Id*. at 11 (citing *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 59 FLRA 703, 708 (2004) (*Customs Service*)). The Agency notes that the Authority has not yet addressed the issue, but argues that the Authority should permit an agency to initiate

bargaining outside the context of term bargaining over substantively negotiable provisions embodied in an expired term agreement. Exceptions at 11-12. The Agency contends that, because mandatory subjects of bargaining contained in an expired term agreement remain enforceable as a matter of past practice, it would make sense for the Authority to apply its "past practice" precedents to an expired term agreement. *Id.* at 12. According to the Agency, this would mean that an agency would be permitted to make a change to the term agreement once it notified the union and completed its bargaining obligation, and that the agency would not be compelled to join the bargaining with term negotiations. *Id*. at 12-13. In support of its position, the Agency cites *United States Patent and Trademark Office*, 57 FLRA 185 (2001) (*USPTO*), where the Authority found that an agency had committed a ULP when it refused the union's request to bargain over the performance appraisal system separately from term bargaining. *Id*. at 13-14. The Agency contends that of special relevance to this dispute is the Authority's statement in *USPTO* that required bargaining is not necessarily "limited to a full, term agreement." *Id*. (quoting *USPTO*, 57 FLRA at 192). The Agency further argues that, because significant distinctions exist between private sector and public sector bargaining, private sector cases are inapplicable to public sector labor-management relations, and the Arbitrator erred in relying on them in his award. Exceptions at 14-17.

The Agency contends that the award is contrary to law for several additional reasons. First, the Agency contends that the Arbitrator erred in ruling that Article 23, Subsection 2.B.4. of the agreement expired with the agreement. *Id.* at 20. Also, the Agency contends that the award is inconsistent with 5 U.S.C. § 6122(a), which permits an agency to make adjustments to the arrival and departure times of employees with AWS arrangements. *Id*. at 21.

In addition, the Agency contends that, assuming the Arbitrator is correct that an agency cannot negotiate substantively negotiable provisions contained in an expired term agreement outside of term bargaining, he erred in finding that the local AWS agreements were "covered by" the expired agreement. *Id*. at 22. Instead, the Agency argues, the expired agreement simply supplied the rules and parameters for local bargaining, and that specific terms were negotiated exclusively at the local level. *Id*. at 24.

The Agency contends that the award fails to draw its essence from the agreement because the award ignores the addition of Subsection 2.B.4, which would have permitted the Agency to propose changes to the local AWS agreements at the end of the six-month discussion period. *Id.* at 18. The Agency argues that the Arbitrator erred when he determined that Subsection 2.B.4. was of "little relevance" because it concerned AWS, a mandatory subject of bargaining and, therefore, continued in effect even though the agreement had expired. *Id*. According to the Agency, by sending notices to the Union of its intent to open certain local AWS agreements for bargaining, it was acting in accordance with the agreement. *Id*. at 20.

B. Union's Opposition[2]

The Union contends that the Arbitrator did not err in relying on private sector case law prohibiting a party from insisting on piecemeal bargaining, and that the Authority should be guided by those precedents. Opp'n at 6. Otherwise, the Union asserts, there would be "chaos in federal sector bargaining" as parties constantly move issues in and out of term bargaining for tactical advantage. *Id*. at 7.

The Union disagrees with the Agency's contention that the Union's right to reject piecemeal bargaining was overtaken by a "covered by" defense. *Id*. at 8. The Union argues that the "covered by" doctrine is irrelevant to whether the Agency committed a ULP when it insisted on piecemeal bargaining after the agreement had expired and negotiations on a successor agreement had begun. *Id*. at 9. Instead, the Union contends, the "covered by" doctrine serves only to excuse a party from bargaining over a matter that is covered by, or contained in, a collective bargaining agreement during the term of the agreement. *Id*. The Union contends that the Agency cannot use the "covered by" doctrine to force bargaining that is outside of term negotiations. *Id*. at 10. Moreover, the Union argues that the Arbitrator did not commit legal error when he found that the local AWS agreements were covered by the expired agreement. *Id*. at 11. According to the Union, this argument merely constitutes disagreement with the Arbitrator's findings of fact. *Id*. at 11-12.

In addition, the Union contends that the Arbitrator did not err in his reliance upon NLRB

2. The Union did not file exceptions to the Arbitrator's finding that the Agency did not commit a ULP or violate the agreement when it insisted on separate negotiations over changes to incentive pay. See Opp'n at 3.

precedents, instead of the Authority's decisions in *Customs Service* and *USPTO*. *Id.* at 13-15. Further, the Union contends that the Arbitrator did not err when he found that the Agency's assertions regarding 5 U.S.C. § 6122(a) were irrelevant to the issues before him. *Id*. at 15-16. According to the Union, § 6122(a) pertains to the establishment of AWS schedules, not to changes to established AWS schedules, and subjects the establishment or termination of AWS schedules to collective bargaining. *Id*. at 16.

Finally, the Union contends that the award draws its essence from the agreement and that the Arbitrator, rather than dismissing the reopener provision in Article 23, simply interpreted the provision differently from the Agency. *Id*. at 17.

IV. Analysis and Conclusions

A. The award is not 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. 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 Agency's basis for insisting that AWS be bargained separately from negotiations over the successor term agreement is Article 23, Subsection 2.B.4. of the expired agreement. However, the Agency withdrew from that permissive term of bargaining effective June 30, 2006, when the agreement expired. Award at 7; J.E. 5, Attach. 1 at 7. By October 2006, when the Agency issued its first notice to the Union that it wished to negotiate changes to the local AWS agreements, the Agency no longer had any contractual right to insist upon bargaining over AWS in accordance with the procedure established in Subsection 2.B.4. Accordingly, the Agency was not, as it contends, simply acting in accordance with the agreement when it insisted on separate bargaining over AWS. For this reason, we deny the Agency's exception that the award is contrary to law because the Arbitrator erred in ruling that Article 23, Subsection 2.B.4. expired on June 30, 2006, with the agreement. *See* Exceptions at 20.

The parties agree that the Authority has not directly addressed the question of whether a party's insistence that a matter be negotiated separate from term bargaining violates the duty to bargain in good faith. *See* Exceptions at 11; Opp'n at 14. Nonetheless, the Agency contends that both *Customs Service* and *USPTO* support the proposition that an agency may insist on negotiating substantively negotiable matters embodied in an expired term agreement outside the confines of term bargaining. However, neither decision supports that proposition. In *Customs Service*, the agency proposed a specific change to unit employees' conditions of employment pursuant to the exercise of management rights under § 7106 of the Statute and, in response, the union proposed to combine impact and implementation bargaining over that change with term bargaining, which included matters unrelated to the exercise of management's rights. *See* 59 FLRA at 703, 708. The Authority held that an agency's bargaining obligation when exercising management rights is limited to procedures and appropriate arrangements under § 7106(b)(2) and (3) and, as the union's proposal was not so limited, the Authority found that the agency had no obligation to bargain over it. *Id.* at 710. Unlike *Customs Service*, the instant case does not involve a union attempt to combine impact and implementation bargaining with term negotiations; it involves an agency attempt to combine *substantive* bargaining with term negotiations -- an issue that *Customs Service* does not address. Similarly, *USPTO* held that an agency's refusal to respond to a union's request to bargain is a ULP; it did not address whether a party may insist on piecemeal bargaining regarding mandatory subjects of bargaining. Consistent with the foregoing, there is an absence of precedent under the Statute that addresses whether an insistence on piecemeal, substantive bargaining violates the duty to bargain in good faith.

The Authority has held that, in the absence of specific precedent under the Statute, it may look to private sector law for guidance. *See U.S. Dep't of the Interior, Bureau of Indian Affairs, Navajo Area Office, Gallup, N.M.*, 45 FLRA 646, 652 (1992). Specifically, "[w]here there are comparable provisions under the Statute and the NLRA, decisions of the National Labor Relations Board (NLRB) and the courts interpreting the NLRA have a 'high degree of relevance' to similar circumstances under the Statute." *Id.* (quoting *U.S. Dep't of Labor, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1381 (1990) (citing *Library of Cong. v. FLRA*,

699 F.2d 1280, 1286-87 (D.C. Cir. 1983) (*Library of Cong.*)).

The NLRB has held that it "is well settled that the statutory purpose of requiring good-faith bargaining would be frustrated if parties were permitted, or indeed required, to engage in piecemeal bargaining." *E.I. Du Pont de Nemours & Co.*, 304 NLRB 792, 792 n.1 (1991); *see also Trumbull Mem'l Hospital*, 288 NLRB 1429, 1446-47 (1988). In these decisions, the NLRB has found that employers, in general, violate their duty to bargain in good faith under § 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1) and (5), by insisting on piecemeal negotiations regarding mandatory subjects of bargaining. Courts reviewing NLRB decisions have adopted the NLRB's view that, in general, insistence on piecemeal bargaining regarding mandatory subjects of bargaining violates the duty under § 8(a)(1) and (5) of the NLRA to bargain in good faith. *See E.I. Du Pont de Nemours & Co.*, 489 F.3d 1310, 1317 (D.C. Cir. 2007) (citing other Court of Appeals decisions).[3]

Here, the circumstances of the NLRB precedents discussed above and the instant case are similar because they both involve an employer's insistence that a union engage in piecemeal bargaining regarding a mandatory subject of bargaining. In addition, the respective relevant statutory provisions, § 8(a) of the NLRA and § 7116(a) of the Statute, which are similarly worded, make clear that it is a ULP for an employer to refuse to bargain in good faith.[4]

The Agency argues that the Arbitrator erred in his reliance upon the NLRB precedent because private sector bargaining differs in significant ways from public sector bargaining. *See* Exceptions at 14-17. The Agency asserts that private sector employers have the incentive to bifurcate subjects of bargaining so that the parties can reach impasse quickly. *See id.* at 15-16. According to the Agency, that is because once the parties have reached impasse, the employer may unilaterally implement its proposed changes. *See id.* By contrast, when impasse is reached in public sector bargaining, a federal agency is not free to implement unilaterally its proposed changes. Instead, the Agency explains, the parties must avail themselves of an impasse resolution process that involves seeking mediation services from either the Federal Mediation and Conciliation Service or a private mediator, and then seeking impasse resolution assistance from the Federal Service Impasses Panel. *See id.* The Agency's assertion that, for this reason, a federal agency would lack the incentive ever to negotiate subjects on a piecemeal basis is pure speculation and is belied by the facts of this case. *See id.* at 15-16.

The Agency further asserts that there is "greater need" to avoid piecemeal bargaining in the private sector than in the public sector. *Id.* at 16-17. According to the Agency, if piecemeal bargaining were permitted in the private sector, parties could remove such "meaty subjects" as wages and benefits "from the total bargaining arena," thereby limiting the range of possible compromises available to the parties. *Id.* at 16. The Agency contends that, because parties in the public sector are prohibited from negotiating over these types of issues, "piecemeal bargaining takes on much less significance." *Id.* at 17. Although the Agency is correct that the scope of private sector collective bargaining differs from that of public sector collective bargaining, this does not, in and of itself,

3. In E.I. Du Pont de Nemours, the D.C. Circuit held that the NLRB reasonably concluded that the company did not violate its duty to bargain in good faith when it separated bargaining on certain issues from the parties' overall contract negotiations because the parties had "a long and firmly established history" of bargaining separately over these issues. 489 F.3d at 1317-18. These facts are not present in the case before us, however.

4. The statutory provisions contain language that is both similar and parallel. Section 8(a) of the NLRA provides, in relevant part, that:

> It shall be an unfair labor practice for an employer -
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
> . . . .
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 7116(a) of the Statute provides, in relevant part, that:

> For the purpose of this chapter, it shall be an unfair labor practice for an agency –
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
> . . . .
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
> or;
> . . . .
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

preclude the consideration of private sector precedents. *See Library of Cong.*, 699 F.2d at 1287 (consideration of analogous private sector precedent held to be appropriate in that case despite differences between private and public sectors). Private sector cases are relevant where, as here, they involve statutory provisions and policy considerations comparable to those governing labor relations under the Statute. *See AFGE, Council 214, AFL-CIO* v. *FLRA*, 835 F.2d 1458, 1461 (D.C. Cir. 1987). As discussed above, the respective relevant statutory provisions of the Statute and the NLRA are comparable. And, as the Arbitrator recognized, there is no essential difference between the two sectors in the basic obligations of the parties to bargain in good faith. *See* Award at 17. The Agency fails to explain how the difference in the subject matters that can be bargained over in the two sectors requires that relevant private sector precedents on good faith bargaining be ignored.

Therefore, we conclude that it was not error for the Arbitrator to find that the Agency breached its duty to bargain in good faith by insisting that the local AWS agreements be negotiated outside of term bargaining over the successor agreement.

We also find that, contrary to the Agency's contentions, the award is not contrary to 5 U.S.C. § 6122(a). Section 6122(a) permits an agency to make adjustments to the arrival and departure times of individual employees within already established flexible bands to ensure that the duties and requirements of the agency's mission are fulfilled. The award, however, does permit the Agency to propose changes to local AWS agreements within the negotiations for a successor agreement; it just does not permit the Agency to do so separately from those negotiations.

The Agency also contends that the Arbitrator's finding that the local AWS agreements are an integral part of the expired agreement is contrary to law. The Agency, however, fails to identify any law with which this finding is contrary. Accordingly, we reject this argument as a bare assertion. *See U.S. Dep't of the Navy, Fleet Readiness Ctr. Sw., San Diego, Cal.*, 63 FLRA 245, 252 (2009) (rejecting as bare assertion union's unsubstantiated argument). Moreover, as the Union correctly notes, this determination was a finding of fact that was disputed by the parties below. Consequently, the Agency's claim provides no other basis for finding that the award is deficient. *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993) (award not deficient where excepting party challenges a factual matter that the parties disputed at arbitration).[5]

Accordingly, we deny this exception.

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

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review 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. *See 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 Agency contends that the Arbitrator's finding that Subsection 2.B.4. of Article 23 is "of little relevance" because it expired with the agreement fails to draw its essence from the parties' agreement. Exceptions at 18. However, in light of the clear evidence that the Agency withdrew from this permissive provision when the agreement expired, we find that the award is not unfounded in reason or fact or unconnected with the wording or purpose of the agreement and that it does not manifest a disregard of the agreement. Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.

5. Contrary to the Union's contention, Opp'n at 8-10, the Agency does not argue in its exceptions that the "covered by" doctrine is an exception to a union's right to reject an agency's insistence on piecemeal bargaining. Accordingly, we do not address this argument.