Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
Respondent
and

Case No. CH-CA-00104

AMERICAN FEDERATION OF
GOVERNMENT

EMPLOYEES, COUNCIL 214, AFL-CIO
Charging Party

William P. Krueger, Esquire For the Respondent
Richard Benge Jr., Executive Assistant For the Charging Party
John F. Gallagher, Esquire For the General Counsel, FLRA
Before: SAMUEL A. CHAITOVITZ Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), 5 C.F.R. § 2411 *et seq.*

This proceeding was initiated by an unfair labor practice charge filed the by the American Federation of Government Employees, Council 214, AFL-CIO (AFGE/Council 214/Union), against the U.S. Department of the Air Force, Air Force Materiel Command (AFMC/Respondent). The Regional Director of the Chicago Region of the FLRA, on behalf of the General Counsel (GC) of the FLRA, issued a Complaint and Notice of Hearing. The Complaint alleges that AFMC failed to comply with section 7122(b) of the Statute and, thereby violated section 7116(a)(1) and (8) of the Statute, by failing to comply with an Arbitrator's order that was issued on October 27, 1999. The Respondent filed an Answer denying the allegation.

A hearing was held in Dayton, Ohio, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, and to introduce evidence and to argue orally. The GC of the FLRA and AFMC filed post-hearing briefs which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law.

Findings of Fact

A. Background

AFGE is the certified exclusive representative of a nationwide unit of employees appropriate for collective bargaining at AFMC. AFGE Council 214 is the agent of AFGE for representing the employees in the bargaining unit.

B. Grievance and Arbitration Concerning "Skills Code"

On April 2, 1997, the AFGE Council 214 filed a grievance pursuant to the parties' negotiated grievance procedure concerning AFMC's failure to "skills code" lower-graded work in mixed grade bargaining unit positions (the skills code grievance).

Skills coding is described in Air Force Regulation Section 40-230 (AFR), as the coding of employees' experience for inclusion in their personnel files. The skills codes are used as a basis for training and selection for other positions. Skills coding lower-graded work entails entering into the personnel data system a record that an employee performed one or more lower-graded duties. The AFMC argued that it was not required to code lower-graded skills claiming, among other things, that it had an exception to AFR 40-230.

The grievance proceeded to binding arbitration and the parties selected Arbitrator Joan Ilivicky to decide the matter. On January 13, 1998, Arbitrator Ilivicky issued her Opinion and Award. Arbitrator Ilivicky sustained the Union's skills code grievance and ordered AFMC to take the following actions: (1) incorporate skills coding of all lower-graded work in mixed grade positions performed by bargaining unit members into the Respondent's Data System; (2) incorporate skills coding retroactive for a period of two years from the date of the award; (3) identify bargaining unit members who were candidates for promotion during the two-year period, but were denied promotions as a consequence of the failure to incorporate skills coding in the Data System and, together with the Union, "review the status of each such candidate and jointly determine whether alternative promotion action is now appropriate;" and

(4) notify, jointly with the Union, bargaining unit members of the terms and conditions of the award in the usual and customary manner employed by the parties for notification of workforce changes in conditions of employment. Arbitrator Ilivicky gave the parties 90 days to comply with the award and she retained jurisdiction for a period not to exceed one year for the purpose of resolving any disputes that might arise concerning compliance with the Award.

AFMC filed exceptions to Arbitrator Ilivicky's January 13, 1998, Award with the Authority under section 7122(a) of the Statute. In its exceptions, AFMC argued that the Arbitrator's award was based on a nonfact that the agency did not have an exception to AFR 40-230 which required skills coding and that the broad remedy ordered by the Arbitrator was improper because AFGE Council 214 had submitted no evidence that any specific bargaining unit employee had been harmed by Respondent's failure to skill code lower-graded work. No exception was filed to the Arbitrator's decision to retain jurisdiction to resolve any compliance disputes.

On January 29, 1999 the Authority, in 55 FLRA No. 29, issued its decision. The Authority denied the Respondent's exceptions but did determine that section (3) of the Arbitrator's remedy that directed the parties to "jointly determine whether alternative promotion action is now appropriate" needed clarification. 55 FLRA 172-74. The Authority directed the parties to, absent settlement, resubmit the matter to Arbitrator Ilivicky for clarification as to whether section (3) of her remedial order was intended to be a sole or alternate selection procedure.

C. Supplemental Submission to Arbitrator

The parties resubmitted the matter to Arbitrator Ilivicky. On April 30, 1999, she issued a Supplemental Opinion and Award which clarified section (3) of her January 13, 1998 Award by deciding that her original order to "jointly determine whether alternative promotion action is now appropriate" was an alternate selection procedure. No exceptions to the Supplemental Opinion and Award were filed with the Authority.

During May and June 1999 the parties discussed compliance with Arbitrator Ilivicky's January 13, 1998 Award and her April 30, 1999 Supplemental Award but could not reach agreement. The parties referred the compliance issues to Arbitrator Ilivicky and on July 21 and 22, and August 10 and 17, 1999, the parties discussed with Arbitrator Ilivicky the implementation steps which were necessary to comply with her Awards. The discussions focused on how AFMC was to gather the skills coding information from the bargaining unit employees so that the employees' personnel files could be properly coded consistent with the Arbitrator's Awards.

D. The Survey

Without the parties having reached agreement on how compliance was to be achieved, the Respondent on October 6, 1999, distributed a memorandum and survey to bargaining unit employees in which employees were advised of Arbitrator Ilivicky's January 1998 Award and April 1999 Supplemental Award, and were requested to provide AFMC with skill code information for compliance purposes.

E. The Arbitrator Issues Instructions

AFGE Council 214 believed that AFMC's October 6 action was not in compliance with the Arbitrator's Awards and sought the assistance of the Arbitrator. On October 25, 1999, the parties discussed with Arbitrator Ilivicky whether the Respondent's October 6 actions were in compliance with her Awards. AFMC specifically requested that the Arbitrator place her decision in writing.

On October 27, 1999, Arbitrator Ilivicky advised the parties, in writing, that AFMC's October 6 actions were not in compliance with her Awards. She directed AFMC to recall the memorandum and survey which were distributed to bargaining unit employees on October 6 and further directed the parties to attend a meeting with her in December 1999 for the purpose of drafting a memorandum and survey for distribution to bargaining unit employees. Further, she stated that any disputes as to the language, distribution or distribution date of the memorandum and survey would be settled by her.

In a letter to Arbitrator Ilivicky, dated November 18, 1999, AFMC refused to recall the October 6 memo and survey and refused to meet with the Arbitrator and the Union in December.

AFMC never recalled the memorandum or survey and never met with the Arbitrator and the Union as directed by the Arbitrator. AFMC did not file exceptions to Arbitrator Ilivicky's October 27 order with the Authority.

F. Arbitrator Retains Jurisdiction

The Arbitrator, in her original award, retained "jurisdiction for a period not to exceed one year for the purpose of resolving disputes that may arise in compliance with this Award." In November 1999 the parties addressed this jurisdiction issue pursuant to the AFGE Council 214's request for the Arbitrator to extend her jurisdiction. AFMC argued that the Arbitrator's jurisdiction expired on January 28, 2000. In a letter to the parties dated December 17, 1999, the Arbitrator stated that her

jurisdiction expired on April 30, 2000, concluding that the one year retention of jurisdiction began with her Supplemental Award which was issued on April 30, 1999.

Discussion and Conclusions of Law

The GC of the FLRA contends that AFMC violated section 7116(a)(1) and (8) of the Statute when it failed to comply with Arbitrator Ilivicky's October 27, 1999 order.

The FLRA has held that, under section 7122(b) of the Statute, an agency must take the action required by an arbitrator's award when that award becomes "final and binding." *U.S. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington,* 55 FLRA 293, 296 (1999)(*FAA*). An arbitration award becomes "final and binding" when there are no timely exceptions filed under section 7122(a) of the Statute or when timely filed exceptions are denied by the Authority. *U.S. Department of the Air Force, Carswell Air Force Base, Texas*, 38 FLRA 99 (1990); *U.S. Department of Health and Human Services, Health Care Financing Administration*, 35 FLRA 491, 494-95 (1990). Disregard of an unambiguous award is an unfair labor practice under section 7116(a)(1) and (8) of the Statute and the only issue in the unfair labor practice proceeding is whether the respondent failed to comply with the award. *FAA*, 55 FLRA at 296.

Arbitrator Ilivicky's January 1998 Award and her April 1999 Supplemental Award on the Union's skills code grievance constitutes final and binding awards under section 7122(b). They required the Respondent to take certain remedial measures and further provided that any compliance disputes would be resolved by Arbitrator Ilivicky.

Pursuant to the express retention of jurisdiction to take subsequent action regarding any compliance disputes, Arbitrator Ilivicky issued her October 27 order directing the Respondent to recall its October 6 memorandum and survey and directing the parties to meet in December to resolve their compliance dispute. It is undisputed that Arbitrator Ilivicky's October 27 order was unambiguous, that AFMC did not file any exceptions to the October 27 order, and that the AFMC failed to comply with Arbitrator Ilivicky's October 27 order. Under these circumstances, it follows that AFMC's refusal to comply with Arbitrator Ilivicky's October 27 order is an unfair labor practice under section 7116(a)(1) and (8) of the Statute. *FAA*, 55 FLRA at 296.

AFMC's defense herein is that Arbitrator Ilivicky's October 27 order is not a "final and binding award" within the meaning of the Statute and, consequently, its failure to comply with the requirements set forth in that order is not conduct which violates the Statute. AFMC concedes that Arbitrator Ilivicky's January 1998 award, as clarified by her April 1999 Supplemental award, is final and binding. AFMC argues that any directions or orders which the Arbitrator issued concerning proper compliance with her award are not binding "awards" under the Statute and thus the Respondent was free to ignore Arbitrator Ilivicky's October 27 order.

AFMC's argument and defense are rejected as without merit. In *U.S. Department of Veterans Administration Medical Center, Leavenworth, Kansas and American Federation of Government Employees, Local 85,* 38 FLRA 232 (1990)*(VAMC Leavenworth)*, the Authority made clear that an order issued by an arbitrator which concerns compliance issues is part and parcel of the final and binding award. In that case, after an arbitrator issued his initial Award and his First Supplemental Decision and Award (dealing with the implementation of the first award) concerning an environmental differential pay issue, the Activity filed exceptions to the Supplemental Award. One argument which the Activity made in its exceptions was that the supplemental award was non-enforceable because the arbitrator was *functus officio* and that he had no jurisdiction concerning compliance disputes over the initial award. *Id*. at 234.[(1)]

Contrary to the Activity's argument, the Authority concluded that the arbitrator had not acted without authority, that as long as an arbitrator had retained jurisdiction for purposes of compliance, the parties were obligated to follow any supplemental orders issued by the arbitrator on compliance. In denying the Activity's exceptions, the Authority provided the following legal rationale:

> Unless an arbitrator retains jurisdiction after issuance of an award, the arbitrator is without legal authority to take any further action with respect to that award without the joint request of the parties. *See General Services Administration and American Federation of Government Employees,Local 2600*, 34 FLRA 1123 (1990)(arbitrator had no authority to reopen award to determine dispute over allocation of costs of arbitration proceeding when he did not retain jurisdiction and both parties stipulated and

agreed that they intended to place the issue before another arbitrator); *Overseas Federation of Teachers AFT, AFL-CIO and Department of Defense Dependents Schools, Mediterranean Region,* 32 FLRA 410, 415 (1988)(arbitrator exceeded his authority by reopening and reconsidering his original award which had become final and binding where he did not retain jurisdiction over the matter and where there was no joint request by the parties).

However, the retention of jurisdiction by arbitrators for the purposes of clarification and interpretation of an award and for overseeing the implementation of remedies is not unusual and has been approved by the Authority. *See Overseas Education Association and Department of Defense Dependents Schools, Atlantic Region,* 31 FLRA 80, 93 (1988)(arbitrator properly retained jurisdiction to assist parties if they could not agree on procedures for implementing award); *Patent and Trademark Office and Patent Office Professional Association,* 15 FLRA 990, 993 (1984)(interest arbitrator did not exceed his authority by retaining jurisdiction to evaluate progress of bargaining). *VAMC Leavenworth*, 38 FLRA at 238-39.

In light of *VAMC Leavenworth*, the AFMC's contention that the October 27 letter is not a "binding award" within the meaning of the Statute is rejected.[(2)] The Authority in *VAMC Leavenworth* could not have made it any clearer that when an arbitrator has retained jurisdiction for the purpose of resolving any compliance disputes with the award, any such supplemental orders or directions concerning compliance are valid awards within the meaning of section 7122 of the Statute which the parties must

comply. *Department of Veterans Affairs, Dwight D. Eisenhower Medical Center, Leavenworth, Kansas*, 44 FLRA 1362 (1992)(agency violated the Statute by failing to comply with the award that was the subject of 38 FLRA 232).[(3)]

Moreover, while it is clear that Arbitrator Ilivicky had retained jurisdiction to make further determinations regarding compliance and that her October 27 order was issued pursuant to that retained jurisdiction, the AFMC cannot attack the validity of Arbitrator Ilivicky's October 27 order in the instant proceeding. The Authority will not review the merits of an arbitration award in a ULP proceeding. *United States Army Adjutant General Publications Center, St. Louis, Missouri*, 22 FLRA 200, 206 (1986); *United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 15 FLRA 151, 153-54 (1984) *affirmed sub nom. Department of the Air Force v. FLRA*, 775 F.2d 727 (6th Cir. 1985). The Authority has stated that to allow a respondent to litigate matters that go to the merits of the award would circumvent Congressional intent with respect to statutory review procedures and the finality of arbitration awards. *FAA*, 55 FLRA at 296; *Department of Health and Human Services, Social Security Administration*, 41 FLRA 755, 765-66 (1991) *enforced, sub nom. Department of Health and Human Services, Social Security Administration v. FLRA*, 976 F.2d 1409 (D.C. Cir. 1992)(under section 7122 of the Statute, arguments that go to the merits of an arbitration award are not litigable in a ULP proceeding brought to enforce the award). Thus, AFMC cannot question the validity of Arbitrator Ilivicky's October 27 order as a defense for its admitted noncompliance.

In light of the foregoing, I conclude that Arbitrator Ilivicky properly retained jurisdiction during the compliance period[(4)], and issued an order on October 27 directing AFMC to rescind the October 6 memorandum and survey and to meet with the AFGE Council and the Arbitrator in December to resolve the compliance dispute. The Arbitrator properly retained jurisdiction for compliance matters, I conclude further, that the October 27 letter was an order issued by the Arbitrator for the purpose of addressing a compliance dispute, and, in the absence of exceptions being filed, was a final and binding award within the meaning of section 7122(b) of the Statute.

Because AFMC has admittedly failed to comply with Arbitrator Ilivicky's October 27 order, I conclude that it has violated section 7116(a)(1) and (8) of the Statute as alleged. *FAA*, 55 FLRA at 296-97.

G. Remedy

I conclude that it is appropriate that AFMC be ordered to comply with Arbitrator Ilivicky's October 27 order and post a Notice to All Employees, signed by the Commander of the Air Force Materiel Command,

throughout the Union's nationwide bargaining unit. Both the grievance and the arbitration decision were national in scope. In addition, the violation herein was not a local matter but was a AFMC command level action that had nationwide ramifications.

To the extent that the AFMC contends that an order requiring it to comply with Arbitrator Ilivicky's October 27 order is inappropriate because her jurisdiction has now expired, such contention must be rejected. When a respondent has failed to comply with an arbitration award, the Authority orders the respondent to comply with the award. *FAA,* 55 FLRA at 301. Moreover, the Authority's remedies are designed to recreate the conditions that would have existed had there been no unfair labor practice. *U.S. Department of Agriculture, Food Safety and Inspection Service, Washington, DC,* 55 FLRA 875, 881 (1999). Compliance with Arbitrator Ilivicky's October 27 order is necessary to recreate the conditions that would have existed had AFMC not violated the Statute. AFMC will not be permitted to profit from its unfair labor practice. *See U.S. Department of the Air Force, Air ForceMateriel Command*, 54 FLRA 914 (1998) and *VAMC Leavenworth*, 38 FLRA at 243.

In light of the foregoing, and having found that AFMC has violated section 7116(a)(1) and (8) of the Statute, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Department of the Air Force, Air Force Materiel Command, shall:

1. Cease and desist from:

(a) Failing to comply with the order of Arbitrator Joan Ilivicky dated October 27, 1999, directing the Respondent to recall its October 6, 1999 memorandum and survey to bargaining unit employees regarding compliance with Arbitrator's Ilivicky's January 1998 Award and April 1999 Supplemental Award on the Union's skills code grievance.

(b) In any like or related manner, interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Rescind the October 6, 1999, bargaining unit employee skills coding survey and accompanying memorandum as directed by Arbitrator Ilivicky in her order dated October 27, 1999.

(b) Pursuant to Arbitrator Ilivicky's October 27, 1999, order, contact Arbitrator Ilivicky in order to establish dates for a meeting during which representatives of the Air Force Materiel Command and the American Federation of Government Employees, Council 214, AFL-CIO, will meet with Arbitrator Ilivicky in order to resolve issues relating to compliance pursuant to her 1998 Award and her 1999 Supplemental Award which involved skills coding.

(c) Participate in meetings with Arbitrator Ilivicky and otherwise fully comply with her awards and orders on compliance matters.

(d) Post at all facilities of the Respondent, nationwide, where bargaining unit employees represented by the American Federation of Government Employees, Council 214, AFL-CIO, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, of the Air Force Materiel Command, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, September 5, 2000.

SAMUEL A. CHAITOVITZ

Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of the Air Force, Air Force Materiel Command, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to comply with the order of Arbitrator Joan Ilivicky dated October 27, 1999, directing the Respondent to recall its October 6, 1999 memorandum and survey to bargaining unit employees regarding compliance with Arbitrator's Ilivicky's January 1998 Award and April 1999 Supplemental Award on the Union's skills code grievance.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, rescind the October 6, 1999, bargaining unit employee skills coding survey and accompanying memorandum as directed by Arbitrator Ilivicky in her order dated October 27, 1999.

WE WILL, pursuant to Arbitrator Ilivicky's October 27, 1999, order, contact Arbitrator Ilivicky in order to establish dates for a meeting during which representatives of the Air Force Materiel Command and the American Federation of Government Employees, Council 214, AFL-CIO, will meet with Arbitrator Ilivicky in order to resolve issues relating to compliance pursuant to her 1998 Award and her 1999 Supplemental Award which involved skills coding.

WE WILL, participate in meetings with Arbitrator Ilivicky and otherwise fully comply with her awards and orders on compliance matters.

_____

(Respondent/Activity)

Date: _____By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, whose address is: 55 W. Monroe Street, Suite 1150, Chicago, IL 60603, and whose telephone number is: (312)353-6306.

1. "" -

2. ''''

3. - ""

4. '