FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR Respondent
andAMERICAN FEDERATION OF
GOVERNMENTEMPLOYEES, LOCAL 12, AFL-CIO
Charging Party

Case No. WA-CA-01-0303

James V. Blair, Esquire For the Respondent Russell E. Binion, Representative For the Charging Party Jeanne Marie Corrado, Esquire For the General Counsel, FLRA Before: SUSAN E. JELEN Administrative Law Judge

DECISION

ON MOTION FOR SUMMARY JUDGMENT

The Washington Regional Director issued a Complaint and Notice of Hearing in this matter on August 27, 2001, alleging that the Department of Labor (the Respondent) failed and refused to comply with a Decision and Award issued by Arbitrator Leroy D. Clark on November 7, 2000, as required by 5 U.S.C. §§ 7121 and 7122. Respondent filed its Answer on September 24, 2001, in which it admits to all the factual allegations in the Complaint. The hearing in this matter was scheduled for November 29, 2001. On November 8, 2001, Counsel for the General Counsel filed a Motion to Postpone Hearing on the basis that the dispute at issue is a pure legal issue appropriate for disposition without necessity for a hearing. Counsel for the General Counsel indicated that she intended to file a Motion for Summary Judgement the next week. She further noted that the Respondent also intended to file a Motion for Summary Judgement in the matter. On November 9, 2001 the prehearing disclosure, prehearing conference, and hearing in this matter were indefinitely postponed by the Chief Administrative Law Judge.

On November 14, 2001, Counsel for the General Counsel filed a Motion For Summary Judgement. On December 12, 2001 Respondent filed its Cross Motion for Summary Judgement.

I fully agree that there are no material issues of fact in dispute and, accordingly, will decide this matter on the basis of the Motions and the attached documents, including: the Charge and its attachments (G.C. Ex. 1(a)-(j); Complaint and Notice of Hearing (G.C. Ex. 2); Answer (G.C. Ex. 3); a letter dated August 16, 2001 to Mr. Michael W. Doheny, Regional Director, Washington Regional Office, Federal Labor Relations Authority from Jerry Lelchook, Director, Labor-Management Relations Center, Department of Labor, Office of the Assistant Secretary for Administration and Management (G.C. Ex. 4), Department of Labor Memoranda dated March 30, 2001, April 3, 2001, May 14, 2001, May 11, 2001 and two from June 18, 2001 (G.C. Ex. 5(a)-(f). The Arbitration Award of Leroy D. Clark dated November 7, 2000, is found at the General Counsel's Exhibit 1(c).

Findings of Fact

The American Federation of Government Employees (AFGE) AFL-CIO, Local 12 (the Charging Party) and the U.S. Department of Labor (the Respondent) are parties to a collective bargaining agreement covering employees in the bargaining unit. The Department of Labor is comprised of eleven Agencies, such as the

Women's Bureau, the Bureau of Labor Statistics and the Employment Training Administration. (G.C. Ex. 1(c) at 1-2). On November 7, 2000, Arbitrator Leroy Clark issued a Decision and Award in an arbitration between the Respondent and the Charging Party. (G.C. Ex. 3) Arbitrator Clark defined the dispute as revolving "around the notification process when space and organizational changes are sought to be implemented solely at the 'Agency level'". (G.C. Ex. 1(c) at 12) Arbitrator Clark set forth the parties positions as follows:

The parties differ on the following: counsel for management argues that the contract contemplates that at the conclusion of the Agency Vice President making his or her suggestions during consultations, that the final plan developed by Agency officials would be shared with the Agency Vice President. The Agency Vice President could determine if there were any outstanding issues, and could institute bargaining, if he so chose. There is no contractual obligation to supply the President of Local 12 with a copy of the final plan at this point, but that management had decided, optionally, to supply the President of Local 12 with a copy as a "courtesy".

Counsel for the Union argues that it is a violation of the contract for Agency officials to supply a copy of the final plan to the Agency Vice President after he has made his suggestions during the consultation. The President of Local 12 is the only Union official who should receive a copy of the final plan at this point. A "courtesy copy" is not sufficient.

(G.C. Ex. 1(c) at 12-13). Arbitrator Clark rejected management's claim that there is no contractual obligation to supply a copy of the final plan to the President of Local 12. (*Id.* at 13). The Arbitrator also rejected the Charging Party's claim that the President of Local 12 is the only union official who should receive final space and organizational plans from management. (*Id.* at 18-23). The Arbitrator did credit testimony from Union officials about the prospect of Agency Vice Presidents acting in disruption of higher Union officials authority and there could be some confusion in roles. In finding that both the Agency Vice President and the President of Local 12 were entitled to receive a copy of final space and organizational plans, Arbitrator Clark stated:

Therefore the Arbitrator rules that when the Agency official supplies the final copies of the space and organizational plans to the Agency Vice President and the President of Local 12, they should accompany it with a statement of the precise authority that each party has. It should be clear that the Agency Vice President is limited to "consultation" and the higher Union officials are the only parties with ultimate authority to determine if there are any outstanding issues and to invoke bargaining.

(G.C. Ex. 1(c) at 24)(emphasis added).

No exceptions were filed to the Arbitrator's Decision and Award with the Federal Labor Relations Authority.

On December 12, 2000 (G.C. Ex. 1(d)), Respondent transmitted the final reorganization plan for the Information Technology Center and the Business Operations Center. The memorandum did not contain "a statement of the precise authority that each party has", as required by Arbitrator Clark's decision. On December 22, 2000 (G.C. Ex. 1(e)) a copy of the final space plan for the Office of Public Affairs was transmitted to the OSHA Vice President and the President of Local 12. The memorandum did not contain "a statement of the precise authority that each party has", as required by Arbitrator Clark's decision. (G.C. Ex. 1(e)). On January 9, 2001 Respondent transmitted a copy of the final space plan for the Office of Management Systems and Organization to the OSHA Vice President and the President of Local 12. The memorandum did not contain "a statement of the precise authority that each party has", as required by Arbitrator Clark's decision. (G.C. Ex. 1(f)). On January 17, 2001 Respondent transmitted a copy of the final plan for the reorganization of the Office of Technology and Survey Processing, Directorate of Technology and Computing Services, Division of Systems Modernization (DSM) to the BLS Vice President and the President of Local 12. The memorandum did not contain "a statement of the precise authority that each party has", as required by Arbitrator Clark's decision. (G.C. Ex. 1(g)). On January 23, 2001, Respondent transmitted the final

reorganization plan for OEUS and OEP to the BLS Vice President and the President of Local 12. The memorandum did not contain "a statement of the precise authority that each party has", as required by Arbitrator Clark's decision. (G.C. Ex. 1(h)). On February 14, 2001, Respondent transmitted the final space renovation plans for the Division of Information Technology Management and Services to the Agency Vice President and the President of Local 12. The memorandum did not contain "a statement of the precise authority that each party has", as required by Arbitrator Clark's decision. (G.C. Ex. 1(i)). On February 14, 2001, Respondent transmitted a copy of the final space plan for the Directorate of Information Technology to the OSHA Vice President and the President of Local 12. The memorandum did not contain "a statement of the precise authority that each party has", as required by Arbitrator Clark's decision. (G.C. Ex. 1(j)).

On February 26, 2001, AFGE Local 12 (the Charging Party) filed an unfair labor practice charge against the U.S. Department of Labor, alleging that the Agency violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), by failing to comply with Arbitrator Clark's November 7, 2000, decision.

On August 16, 2001, in response to the allegations of the unfair labor practice charge, Respondent, by Jerry Lelchook, Director, Labor-Management Relations Center, noted that it takes exception to the ruling of Arbitrator Clark, in part, particularly the section in which the Arbitrator rules "that when the Agency official supplies the final copies of the space and organization plans . . . they should accompany it with a statement of the precise authority that each party has." (G.C. Ex. 4). Respondent admits that it has refused to incorporate such statements into its written communications to the Union. Respondent asserts that it has accepted the substantive rulings of the Arbitrator and has implemented the essence of his holdings by sending copies of its final plans to the Union President and the appropriate Agency Vice President. Respondent, however, refuses to make any statement in management communications regarding the authority of different Union officials, and argues that "[s]uch a statement is not required or prescribed anywhere in our collective bargaining agreement and, moreover, it is a matter internal to the Union." (G.C. Ex. 4 at 2). "The Arbitrator's extra-contractual requirement placing management in the ridiculous position of stating in a communication to the Union the respective authorities of different Union officials is extremely problematic. This is a matter internal to the Union and the Department refuses to place itself in the middle of such internal Union matters." (G.C. Ex. 4)

Additional examples (dated from March 30, 2001 through June 18, 2001) of the Respondent's transmittal of final plans for relocations, systems space changes, reorganizations, and space changes are found in the General Counsel's Exhibit 5(a)-(f). In all of these examples, Respondent has transmitted the final plans to both the President of Local 12 and to the appropriate Agency Vice President of Local 12, in accordance with the decision of Arbitrator Clark. The Respondent has not, however, included any "statement of the precise authority that each party has", as required by Arbitrator Clark's decision.

On August 27, 2001, the Regional Director for the Washington Region issued a Complaint and Notice of Hearing, alleging that the Respondent had failed to comply with the Arbitrator Clark's award as required by 5 U.S.C. §§ 7121 and 7122. The Complaint further alleged that by such conduct, Respondent violated 5 U.S.C. § 7116(a)(1) and (8). (G.C. Ex. 3)

Discussions

Positions of the Parties

The General Counsel asserts that it has the burden of proving that the Respondent was required to take an action by a final and binding award and failed to do so. *U.S. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington,* 55 FLRA

293, 296 (1999)(*FAA*); *Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region*, 23 FLRA 891, 893-94 (1986). The Respondent does not dispute that it has refused to comply with the portion of the Arbitrator's decision that stated that it include a statement of the precise authority that each party has when it gives notification of final action. The General Counsel argues that the Respondent attempts to justify its failure to comply by challenging the legality of the award, arguing that the Arbitrator imposed an "extra-contractual requirement" and exceeded his authority and that the award failed to draw its essence from the parties' collective bargaining agreement. The General Counsel asserts that such questions should have been raised through timely exceptions to the Federal Labor Relations Authority. Since the Respondent failed to file any exceptions to the Arbitrator's award, the Respondent is now barred from collaterally attacking the award. *See Department of Health and Human Services, Social Security Administration*, 41 FLRA 755, 765 (1991) *enforced sub nom. Department of Health and Human Services v. FLRA*, 976 F.2d 1409 (D.C. Cir. 1992). Therefore, the General Counsel argues that the Respondent has failed to comply with the entire arbitration award by its conduct and has violated the Statute as alleged.

The Respondent admits that it has not complied with a portion of the Arbitrator's award. However, Respondent argues that its interpretation of the arbitration award is reasonable and that its conduct is therefore not violative of the Statute. *United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas*, 25 FLRA 71, 72 (1987)(*IRS*).

The Respondent argues that the plain and usual meaning of the word "should" allows it discretion in implementation, rather than requiring its conduct. Citing Sutherland § 57.3 (6th ed. 2001). The Respondent also cites *U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, Local 1923*, 43 FLRA 538 (1991)(*SSA*), in which the FLRA denied the union's exceptions to an arbitration award. In that case the Arbitrator found that the agency's issuance of awards was discretionary. In the absence of the word "should" in either the parties' collective bargaining agreement or the regulations, the Arbitrator applied the word's ordinary meaning of implying only a duty or obligation rather than a requirement. Respondent therefore argues that since the language of the Arbitrator's award was discretionary, it was not required to include the language at issue and it did not violate the Statute by not doing so.

The Respondent further argues that the issue of bargaining after plans were transmitted to the Union had been submitted to another arbitrator and therefore, Arbitrator Clark, by requiring such language, exceeded his authority and his award is therefore not legal.

Finally the Respondent argues that requiring the agency to inform various Union officials what their rights are amounts to interference with Union

affairs. The Arbitrator's award enlists the agency to help the Union resolve its internal problems, which the Respondent argues is a ludicrous position.

Counsel for the General Counsel did not respond to any of these arguments by the Respondent, relying instead on its theory that the Respondent is attempting to relitigate the merits of the grievance through this unfair labor practice process, rather than filing exceptions to the arbitration award under section 7122 of the Statute.

Legal Framework

It is well established that, under section 7122(b) of the Statute, an agency must take the action required by an arbitrator's award when the award becomes "final and binding". The 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. *FAA*, 55 FLRA at 293; *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. *United States Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas,* 44 FLRA 1306, 1315 (1992), *reconsideration denied,* 45 FLRA 525 (1992); *and U.S. Customs Service, Washington, D.C.,* 39 FLRA 749, 757-58 (1991).

Whether an agency has adequately complied with an arbitration award depends, in part, on the clarity of the award. Where an agency disregard portions of an arbitrator's award or otherwise changes such an award, the agency fails to comply with the award within the meaning of section 7122(b) of the Statute. *Department of the Interior, Bureau of Reclamation, Upper Colorado River Storage Project, Salt Lake City, Utah,* 28 FLRA 596, 605 (1987); *U.S. Department of Justice and Department of Justice, Bureau of Prisons (Washington, D.C.) and Federal Correctional Institution (Danbury, Connecticut),* 20 FLRA 39, 43 (1985), *enforced sub nom. United States Department of Justice v. FLRA,* 792 F.2d 25 (2d Cir. 1986), and *Department of Justice, U.S. Immigration and Naturalization Service, Washington, D.C.,* 16 FLRA 840, 842 (1984). Where an arbitration award is ambiguous, the Authority examines whether the agency's construction of the award is reasonable in determining whether the agency adequately complied with the award. *U.S. Patent and Trademark Office,* 31 FLRA 952, 975 (1988), *remanded as to other matters sub nom. Patent Office Professional Association v. FLRA,* 872 F.2d 451 (D.C. Cir. 1989); *and IRS,* 25 FLRA at 72.

Analysis

Arbitrator Clark's award became "final and binding" when the Respondent did not file exceptions to the award with the Authority. *FAA,* 55 FLRA at 296. The Respondent has, in fact, implemented a portion of the award which required that it serve a copy of final space and organizational plans on both the Union President and the Vice President of the component

at issue, such as the Information Technology Center and the Business Operations Center, Occupational Safety and Health Administration and Bureau of Labor Statistics, etc. The Respondent admits that it has refused to comply with the portion of the award that states: "Therefore the Arbitrator rules that when the Agency official supplies the final copies of the space and organizational plans to the Agency Vice President and the President of Local 12, they should accompany it with a statement of the precise authority that each party has. It should be clear that the Agency Vice President is limited to 'consultation' and the higher union officials are the only parties with ultimate authority to determine if there are any outstanding issues and to invoke bargaining." (G.C. Ex. 1(c) at 24).

The Respondent cites with approval the Authority's decision in *SSA,* 43 FLRA at 538, in which the Authority denied the Union's exceptions to an arbitration award concerning the Agency's failure to give the grievant a performance award. The Arbitrator examined the parties' collective bargaining agreement, the Department of Health and Human Services (HHS) regulations and the Social Security Administration Personnel Manual for Supervisors (SSA Personnel Manual) on the issue of whether the decision to grant a performance award was at the discretion of management. The Arbitrator determined that as Article 17 merely stated that the Agency "may" provide incentive awards, management was accorded discretion to do so and "under no circumstances are employees therefore contractually entitled to automatically receive incentive awards." *SSA,* 43 FLRA at 540. The Arbitrator then considered HHS and SSA regulations and guidelines and found that like the collective bargaining agreement they also provided the grant of performance awards as discretionary. As Article 17 of the parties' collective bargaining agreement made the grant of awards discretionary, the agency would not have unilaterally promulgated regulations that would severely restrict those discretionary powers by making many of the awards automatic. In the absence of a definition of "should" (as found in the regulations and SSA Personnel Manual) in the collective bargaining agreement and the regulations, the Arbitrator stated he would apply the word's ordinary meaning of implying only a duty or obligation rather than a requirement.

The Authority determined that as "the Arbitrator properly looked to the parties' agreement in interpreting the scope of the Agency's discretion in this matter, the Union cannot prevail by arguing that the Agency's regulations require a more restrictive interpretation. Rather, the Union's contention constitutes nothing more than disagreement with the Arbitrator's findings, reasoning and conclusions and as such provides no basis for finding the award deficient." *SSA*, 43 FLRA at 546 (citations omitted).

Relying on the above case, the Respondent argues that the Authority has interpreted the word "should" to grant discretion to the agency. Therefore Respondent argues that in this case, it had the discretion to insert the language or not and that its decision to not abide by the arbitration award and to not insert the language was within its discretion and therefore a reasonable interpretation of the arbitration award. This argument, however, fails to examine the totality of the circumstances in this matter. In *SSA supra,* the Arbitrator and then the Authority first looked at the parties' collective bargaining agreement and then the attending regulations and SSA Personnel Manual. The collective bargaining agreement, however, was clearly the primary document to guide the arbitrator.

Respondent's defense in this case fails to examine the totality of Arbitrator Clark's award. Arbitrator Clark specifically explained his concern regarding the Union's internal issues, ordered the Respondent to include language in its transmission of final plans to the Union and then gave the Respondent specific instructions as to what the language would say. "It should be clear that the Agency Vice President is limited to 'consultation' and the higher Union officials are the only parties with ultimate authority to determine if there are any outstanding issues and to invoke bargaining." (G.C. Ex. 1(c) at 24). The Arbitrator clearly intended such language to be included with the transmission of any final space and organizational plans and the Respondent's argument that its interpretation of the arbitration award giving it the discretion to do or not do what the arbitrator ordered is not a reasonable interpretation of the arbitration award. Rather, the Respondent's

argument is nothing more than mere disagreement with the Arbitrator's findings, reasoning and conclusions.(1)

Respondent's other arguments, that the Arbitrator exceeded his authority by dealing with the issue of bargaining in his decision and that the Arbitrator's award requires the agency to interfere with Union affairs, are simply attempts to relitigate the merits of the grievance in the unfair labor practice format. As Respondent failed to file challenges to the legality of the award in the appropriate forum, it is now barred from collaterally attacking the award in this unfair labor practice proceeding. *U.S. Department of Defense, Defense Distribution Region East, New Cumberland, Pennsylvania and American Federation of Government Employees, Local 2004*, 51 FLRA 155, 159 (1995).

As stated above, the appropriate action by the Respondent would have been to file exceptions to the arbitration award with the Authority. Since the Respondent did not file exceptions, the award became final and binding and its subsequent attempts to collaterally attack the award are not viable. I therefore find that the Respondent, by its failure to comply with Arbitrator Clark's final and binding award, violated section 7122 of the Statute and thereby violated section 7116(a)(1) and (8) of the Statute. The General Counsel's Motion for Summary Judgment is granted; the Respondent's Cross Motion for Summary Judgment is hereby, denied.

Remedy

Having found that the Respondent violated the Statute by failing to comply with a final and binding arbitration award, an appropriate remedy includes an order requiring the Respondent to comply with the final and binding award of Arbitrator Leroy D. Clark by including with the final copies of the space and organizational plans to the Agency Vice President and the President of Local 12, a statement of the precise authority that each party has. It should be clear that the Agency Vice President is limited to "consultation" and the higher Union officials are the only parties with ultimate authority to determine if there are any outstanding issues and to invoke bargaining.

Based on the above findings and conclusions, I find that the Respondent violated section 7116(a)(1) and (8) of the Statute as alleged, and 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, it is hereby ordered that the U.S. Department of Labor, Washington, D.C., shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the final and binding award of Arbitrator Leroy D. Clark dated November 7, 2000.

(b) In any like or related manner, interfering with, restraining, or coercing its 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 Federal Service Labor-Management Relations Statute:

(a) Comply with the final and binding award of Arbitrator Leroy D. Clark by accompanying final copies of space and reorganization plans to the Agency Vice President and the President of Local 12, with statements of the precise authority of each party.

(b) Post at its Washington, D.C. facilities, where bargaining unit employees 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 Secretary, and 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.

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

Issued, Washington, DC, March 14, 2002.

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SUSAN E. JELEN

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Authority has found that the U.S. Department of Labor, Washington, D.C., 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 and refuse to comply with the final and binding award of Arbitrator Leroy D. Clark dated November 7, 2000.

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 comply with the final and binding award of Arbitrator Leroy D. Clark by accompanying final copies of space and reorganization plans to the Agency Vice President and the President of Local 12, with statements of the precise authority of each party.

_____

(Respondent/Agency)

Dated:_____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 Acting Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 800 "K" Street, NW., Suite 910, Washington, DC 20001, and whose telephone number is: (202)482-6700.

1. Nor does the dictionary definition of should assist the Respondent. Webster's Third New International Dictionary (unabridged)(1986) defines should as "used in auxiliary function to express duty, obligation, necessity, propriety or expediency", none of which indicates discretion in the face of an explicit arbitration award. *See U.S. Department of Veterans Affairs, St. Peterburg, Florida*, 51 FLRA 530, 538 n.7 (1995).