66 FLRA No. 98

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4293
(64 FLRA 281 (2009))

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DECISION

February 29, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Joshua M. Javits 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.

In a prior decision, the Authority remanded an award by the Arbitrator (the initial award) to determine whether the Agency's reclassifications of certain positions had greater-than-de-minimis effects on conditions of employment. *NTEU*, 64 FLRA 281, 284 (2009). In an award on remand (the remand award) — the award at issue here — the Arbitrator found that they did, and that the Agency violated § 7116(a)(5) of the Statute by failing to bargain over their impact and implementation.[1] For the reasons discussed below, we deny the Agency's exceptions.

II. Background and Arbitrator's Awards

This dispute involves the system that the Agency uses to grant performance-based, monetary awards (performance awards) to employees. Remand Award at 12; *see also id.* at 7-8, 30. Under that system, the Agency groups employees into pools (awards pools) at the organizational, occupational, and state levels. *See id.* at 7-8, 29-30; *see also* Exceptions, Attach. 7 at 21-22. There are about 1,000 awards pools in the system, and each pool must contain at least eleven employees. *See* Remand Award at 7. The Agency gives performance awards to employees who are rated in the top fifty-five percent of an awards pool. *See id.* at 8.

The dispute at issue here began when the Agency unilaterally reclassified certain positions held by more than 200 employees (reclassified employees). *See id.* at 2-3, 28; Exceptions, Attach. 8 at 22-23. The Agency determined that the reclassifications required it to move the reclassified employees into different occupational-awards pools. *See* Remand Award at 8, 28.

In response to the Agency's actions, the Union filed a grievance, which was unresolved and submitted to arbitration. *See NTEU*, 64 FLRA at 281. The issues before the Arbitrator in the proceedings that resulted in the initial award were whether the Agency violated the Statute and the parties' agreement by reclassifying the positions without negotiating with the Union, and if so, what the remedy should be. *See* Remand Award at 2.[2]

In the initial award, the Arbitrator determined that the grievance was not arbitrable because it concerned the classification of positions, and he dismissed the grievance. *See NTEU*, 64 FLRA at 282. On exceptions to the initial award, the Authority found that the grievance did not concern classification, *see id.* at 283, and remanded the matter for a determination as to "whether the reclassifications had a greater[-]than[-]de[-]minimis impact on conditions of employment, thereby giving rise to a bargaining obligation," *id.* at 284.

On remand, the Arbitrator cited the testimony of an Agency witness and a Union witness. *See* Remand Award at 7-8, 12, 28-29. The Arbitrator noted that the Agency witness cited an analysis that she had conducted and testified that, based on that analysis, the reclassifications had "no impact on employee performance awards." *Id.* at 12; *see also id.* at 29. The Arbitrator also noted that the Agency witness "acknowledged that her analysis did not include all of the [Agency locations] at issue . . . including several of the smaller [locations]." *Id.* at 12. Because the Agency witness's analysis "focused on . . . Philadelphia," rather than on other, smaller, locations, the Arbitrator found that the Agency witness's conclusion — that the reclassifications did not affect employee awards — was "not dispositive." *Id.* at 29. Accordingly, the Arbitrator determined that the Agency had not

[1] Section 7116(a)(5) states, in pertinent part, that it is an unfair labor practice to "refuse to consult or negotiate in good faith with a labor organization."

[2] We cite to the remand award when referencing the initial award because the remand award incorporates the initial award.

demonstrated that awards pools in smaller locations were "also unaffected." *Id.*

The Arbitrator noted that the Union witness testified that the reclassifications had a "domino effect on all . . . awards pools" that would "affect whether or not an employee received an award." *Id.* at 8. Crediting this testimony, the Arbitrator found that the reclassifications could have a "domino effect" that "[u]ltimately . . . could have [affected] which employees might receive an award." *Id.* at 28. Based on that finding, the Arbitrator concluded that the reclassifications "ultimately did have an impact on reclassified employees" and that the reclassifications' effects were "greater than de minimis in nature." *Id.* at 29. The Arbitrator directed the parties to bargain over the impact and implementation of the reclassifications, and to identify employees who suffered a financial loss as a result of them. *Id.* at 29-30. The Arbitrator denied the Union's request for a status quo ante remedy and attorney fees, and retained jurisdiction to assist the parties in implementing the award. *Id.* at 30.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the remand award is based on nonfacts, Exceptions at 2, because: (1) other than the Union witness's "unsubstantiated allegations," there is "no evidence in the record of any[thing] more tha[n a] de[-]minimis impact on any employee," *id.* at 7; and (2) the Arbitrator stated that the Agency witness's analysis "'focused on . . . Philadelphia'" even though that witness "testified about eight [locations] in addition to Philadelphia," *id.* at 6 (quoting Remand Award at 29).

The Agency also asserts that the remand award is contrary to law because the Arbitrator "placed the burden of proof on the Agency to demonstrate that the changes at issue were de minimis." Exceptions at 2. To support this assertion, the Agency argues that: (1) the Arbitrator "relied heavily on his belief that the evidence produced by the Agency did not establish that the reclassifications had no impact," *id.* at 5; (2) the Union "produced no evidence of an adverse effect" other than through its witness, whose testimony was "self-serving and [full of] unsubstantiated generalities," *id.* at 3-4; and (3) when, at the hearing, the Union asked for Agency data from 2005-2007 to "'determine whether the reclassification[s] adversely affected awards,'" the Union effectively admitted that it had not produced evidence demonstrating that the reclassifications adversely affected employees, *id.* at 4 (quoting Exceptions, Attach. 5 at 36).

B. Union's Opposition

The Union argues that the remand award is not based on nonfacts because the Arbitrator's statement about the Agency witness's focus on Philadelphia was not a central fact underlying the remand award. *See* Opp'n at 11. The Union also argues that the remand award is not contrary to law, asserting that "nowhere in [the remand award] does [the Arbitrator] state that the burden of proof rests upon the Agency." *Id.* at 5.

IV. Analysis and Conclusions

A. The remand award is not based on nonfacts.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *E.g.*, *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 242 (2011) (*Treasury*). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *Id.*

The Agency argues that the remand award is based on a nonfact because there is "no evidence in the record of any[thing] more tha[n a] de[-]minimis impact on any employee," other than the Union witness's "unsubstantiated allegations." Exceptions at 7. But the record shows that the Agency and the Union provided conflicting evidence and arguments as to whether, and to what extent, the reclassifications affected employees. *See* Remand Award at 7-8, 12-14, 20, 28-29. Thus, even assuming that the Arbitrator's finding of greater-than-de-minimis impact is a factual matter, the parties disputed that matter at arbitration, and we will not find that the award is based on a nonfact on this basis. *See Treasury*, 66 FLRA at 242.

The Agency also argues that the remand award is based on the nonfact that the Agency witness's analysis "focused on . . . Philadelphia," Remand Award at 29, when in fact the witness "testified about eight [locations] in addition to Philadelphia," Exceptions at 6. However, the Agency has not shown that the Arbitrator's alleged factual error is a central fact underlying the award. In this regard, the Arbitrator relied on other evidence, specifically, the Union witness's testimony, to conclude that the effects of the reclassifications were greater than de minimis. *See* Remand Award at 7-8, 28-29. Thus, the Agency has not demonstrated that, but for the Arbitrator's alleged factual error, the Arbitrator would have reached a different conclusion. *See* Exceptions at 6. Accordingly, the Agency provides no basis for finding that the remand award is based on a nonfact. *See Treasury*, 66 FLRA at 242.

Based on the foregoing, we deny the Agency's nonfact exceptions.

B. The remand 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 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). Absent a determination that a factual finding is deficient as based on a nonfact, the Authority defers to an arbitrator's factual findings in resolving whether the award is contrary to law. *See, e.g.*, *AFGE, Local 1164*, 66 FLRA 74, 78 (2011). In this connection, the Authority has held that challenges to an arbitrator's evaluation of evidence, and to an arbitrator's determination of the weight to be accorded such evidence, do not demonstrate that an award is contrary to law. *See, e.g., U.S Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 356, 362 (2010) (*DHS*).

When resolving a grievance that alleges an unfair labor practice (ULP) under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *Treasury*, 66 FLRA at 239. An arbitrator resolving such a grievance must therefore apply the same standards and burdens that are applied by ALJs under § 7118 of the Statute. *Id.* In a grievance that alleges a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *Id.* As in other arbitration cases, in determining whether the award is contrary to the Statute, the Authority defers to the arbitrator's findings of fact. *Id.*

Prior to changing unit employees' conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain under the Statute. *Id.* As relevant here, an agency is required to bargain over the impact and implementation of changes that have greater-than-de-minimis effects on conditions of employment. *See, e.g.*, *Patent Office Prof'l Ass'n*, 66 FLRA 247, 253 (2011). In assessing whether the effect of a change is greater than de minimis, the Authority looks to the nature and extent of *either* the effect, *or* the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *E.g.*, *Treasury*, 66 FLRA at 240. The Authority has found that changes to conditions of employment were greater than de minimis where, for example, they affected employees' earning potentials. *See, e.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 318 (2004) (*Veterans*) (Member Armendariz dissenting in part) (effect of lost opportunity to earn overtime and differential pay found to be greater than de minimis).

Here, the Arbitrator found that the Agency's decision to move reclassified employees into different awards pools caused changes in the awards-pool system that could ultimately affect which employees received performance awards. *See* Remand Award at 28-29. Based on that finding, the Arbitrator concluded that the reclassifications had effects that were greater than de minimis. *See id.* That conclusion is consistent with Authority precedent finding that changes, or reasonably foreseeable changes, that affect employees' earning potentials may be greater than de minimis. *See Treasury*, 66 FLRA at 240; *Veterans*, 60 FLRA at 318.

As for the Agency's claim that the Arbitrator "placed the burden of proof on the Agency," Exceptions at 2, to show that the reclassifications had only de-minimis effects, the Arbitrator did not do so, *see* Remand Award at 28-29. Rather, he considered the evidence — including the Union witness's testimony, which he credited — and found that the effects of the reclassifications were greater than de minimis. *See id.* To the extent that the Agency is challenging the Arbitrator's evaluation of evidence and his determination of the weight to be accorded such evidence, that challenge does not demonstrate that the remand award is contrary to law. *See DHS*, 65 FLRA at 362. As for the Agency's claim that the Union admitted, through its data request, that it had not shown that any employees were actually adversely affected by the reclassifications, *see* Exceptions at 4, as stated above, the duty to bargain is triggered by effects, or *reasonably foreseeable* effects, that are greater than de minimis, *see Treasury*, 66 FLRA at 240. Because the Arbitrator concluded that the reclassifications had *reasonably foreseeable* effects that were greater than de minimis, *see* Remand Award at 28-29, the Agency's claim provides no basis for finding that the remand award is contrary to law.

Based on the foregoing, we find that the Agency has not demonstrated that the remand award is contrary to law, and deny the contrary-to-law exception.

V. Decision

The Agency's exceptions are denied.