68 FLRA No. 2

SPORT AIR TRAFFIC CONTROLLERS
ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
EDWARDS AIR FORCE BASE, CALIFORNIA
(Agency)

0-AR-5011

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DECISION

October 14, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Philip Tamoush found that the Agency did not violate the parties' collective-bargaining agreement or the Federal Service Labor-Management Relations Statute (the Statute)[1] when it began furloughing employees in the Space Positioning Optical Radar Tracking Military Radar Unit (SPORT) before completing impact-and-implementation bargaining over the furlough plan.

This case presents the Authority with two questions: whether the award is contrary to § 7116(a)(1) and (5) of the Statute and whether the award is based on a nonfact. Because the Union has not established that the award is contrary to law or that the Arbitrator relied on a nonfact, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The facts of this case are straightforward and largely undisputed. The Budget Control Act of 2011[2] required Congress to pass a budget reduction plan by November 2011; however, Congress was unable to pass a budget plan, triggering a process known as "sequestration," which required across-the-board cuts to the federal discretionary budget. Sequestration required many federal agencies, including the Agency, to furlough their employees. On May 14, 2013,[3] the Secretary of Defense issued an order directing agencies within the Department of Defense (DOD) to furlough employees for eighty-eight hours. The furloughs were to begin no earlier than July 8, and were to be completed by September 21.

The parties began bargaining over the impact and implementation of the Agency's furlough plan even before the issuance of the May 14 order; however, they were unable to reach agreement. The primary point of dispute was when the furloughs would begin. The Agency wanted to furlough all of its employees, including those represented by the Union, beginning the week of July 8. Conversely, the Union wanted to delay the start of furloughs by two weeks, beginning the week of July 21.

The parties were unable to resolve their dispute, even with the assistance of a third-party mediator, and the Union requested the assistance of the Federal Service Impasses Panel (Panel) in late June. However, the Panel was not able to resolve the impasse before the week of July 8, at which time the Agency began furloughing the SPORT employees, contending that it was necessary for the functioning of the Agency. In response, the Union filed a grievance, which was unresolved, and the parties submitted the matter to arbitration.

Before the Arbitrator, the Agency argued that it needed to begin the furlough immediately because it was likely that the length of the furlough would be reduced – and indeed, on August 6, the Secretary of Defense issued an order reducing the length of the furlough to forty-eight hours. The Agency stated that it had already reached agreement with bargaining units representing the majority of the other 3500 Agency employees to begin furloughs on July 8, and it contended that, if the furloughs were shortened, "SPORT would have been overstaffed on the front end[] and understaffed on the back end."[4] Further, the Agency asserted that "the cost of flying operations was approximately $1 million per day, and it would not be effective and efficient to spend this money if SPORT [bargaining-unit employees] were not available to control aircraft."[5] Moreover, the Agency contended that it had "no authority to use military personnel, contractors, or pay overtime to take the place of unavailable [SPORT] controllers."[6]

The Union argued that the Agency did not establish that it was necessary to implement furloughs for SPORT the week of July 8. Specifically, it argued that

[1] 5 U.S.C. §§ 7101-7135.
[2] Pub. L. 112-25 (Aug. 2, 2011).
[3] All dates are in 2013 unless otherwise noted.
[4] Exceptions, Attach. 3, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 6.
[5] *Id.*
[6] *Id.*

the Union's plan to have the employees begin their furlough on July 21 would allow them to complete eighty-eight hours of furlough time by the end of the fiscal year because the employees were on a compressed work schedule. Further, the Union argued that the Agency's justification for implementing on July 8 was speculative because the Agency did not know whether the DOD would reduce the length of the furloughs, and if so, by how much.

The Arbitrator found in favor of the Agency. He found that the Agency commander's testimony provided "compelling" evidence that the Agency implemented the furlough when it did "for good logistical reasons."[7] And the Arbitrator observed that the Agency had already reached agreement with the unions representing other Agency employees for furloughs beginning on July 8. Accordingly, the Arbitrator "adopt[ed] the rationale of the Agency in not waiting for the conclusion of the negotiations and impasses processes, but rather implementing the July 8 initiation of all affected furloughs, rather than several weeks later."[8] He therefore determined that implementing the furloughs on July 8 "was necessary for the functioning of the Agency," and that, as a result, the Agency did not violate the parties' agreement or "federal law."[9] Finally, the Arbitrator ordered the Union, as the losing party, to pay arbitration costs.

The Union filed exceptions to the Arbitrator's award, and the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The award is not contrary to law.

Here, the Arbitrator found that the "Agency did not violate . . . federal law,"[10] and the award includes a citation to an Authority unfair-labor-practice (ULP) decision.[11] Further, the grievance alleged that the Agency violated § 7116(a)(1) and (5) of the Statute,[12] the Union's proposed issue included whether "the Agency violate[d] . . . federal law,"[13] and the Agency's proposed issue specifically referenced the Authority's "necessary-functioning" defense[14] – which is a defense to a charge of unilateral implementation, in violation of § 7116(a)(1) and (5) of the Statute.[15] Moreover, both parties' post-hearing briefs discuss whether the Agency committed a ULP,[16] and both agree in their filings with the Authority that this case turns on whether the Agency established a "necessary-functioning" defense.[17] Accordingly, we find that the parties submitted the issue of whether the Agency committed a ULP to arbitration[18] and that the Arbitrator resolved the issue when he found that the "Agency did not violate . . . federal law."[19]

The Union alleges that the Arbitrator erred when he concluded that implementing the furloughs on July 8 was necessary to the functioning of the Agency and, therefore, not a ULP. 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.[20] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[21] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[22] When a grievance involves an alleged ULP, the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118 of the Statute.[23]

It is well established that before changing conditions of employment, an agency must satisfy its duty to bargain.[24] Further, the impasse resolution procedures of the Panel are an aspect of the collective-bargaining process.[25] Once a party timely requests the assistance of the Panel, "the status quo must be maintained to the maximum extent possible."[26]

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[7] Award at 7.
[8] *Id.*
[9] *Id.* at 8.
[10] *Id.*
[11] *Id.* at 5 (citing *NTEU*, 64 FLRA 127, 129 (2009)).
[12] Agency's Post-Hr'g Br. at 8.
[13] Exceptions, Attach. 2, Union's Post-Hr'g Br. (Union's Post-Hr'g Br.) at 4.
[14] Agency's Post-Hr'g Br. at 3.
[15] *E.g.*, *NTEU*, 64 FLRA 127, 129 (2009) (citing *U.S. DOJ, INS*, 55 FLRA 892, 904 (1999) (*INS*)).
[16] *See* Union's Post-Hr'g Br. at 6-11; Agency's Post-Hr'g Br. at 4-5, 8-9.
[17] Exceptions at 5; Opp'n at 3.
[18] *Cf. AFGE, Local 3529*, 57 FLRA 464, 466 (2001) (remanding award because Authority could not determine whether ULP had been submitted to arbitration).
[19] Award at 8.
[20] *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)).
[21] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[22] *Id.*
[23] *AFGE, Local 3529*, 57 FLRA at 465 (citing *NTEU, Chapter 168*, 55 FLRA 237, 241 (1999)).
[24] *NTEU*, 64 FLRA 127, 129 (2009) (citing *Dep't of the Air Force, Scott Air Force Base, Ill.*, 5 FLRA 9, 11 (1981)).
[25] *Dep't of HHS, SSA & SSA, Field Operations, Region II*, 35 FLRA 940, 948 (1990) (citing *SSA*, 35 FLRA 296, 304 (1990)).
[26] *Id.* at 949-50.

But an agency may unilaterally change working conditions if the changes are necessary to the functioning of the agency.[27] Thus, "necessary functioning" is a defense to a charge of unlawful unilateral implementation.[28] "An agency asserting the defense has the burden to establish 'that its actions were in fact consistent with the necessary functioning of the agency, such that a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission.'"[29] In applying the exception, the Authority has found that "whether its requirements are satisfied depends primarily on whether the agency produces adequate factual support for its assertions of necessity."[30] Moreover, the Authority has observed that "determinations as to whether an agency has satisfied the requirements of the 'necessary[-]functioning' exception are primarily, if not completely, factual."[31]

The Union contends that the Arbitrator did not properly apply Authority precedent regarding the necessary-functioning defense. Specifically, the Union asserts that the Arbitrator did not factually distinguish this case from the Authority's decisions in *U.S. DHS, U.S. CBP*[32] and *U.S. DOJ, INS*.[33] However, in both of those cases, the factfinder found the agency's necessary-functioning defense to be unsupported.[34] Here, the Agency provided evidence to support its necessary-functioning claim, the Arbitrator credited the Agency's evidence, and the Union has not provided a basis for finding that the Arbitrator erred in doing so. Accordingly, the Union has not established that the Arbitrator misapplied Authority precedent.

The Union also argues that the Agency did "not offer any evidence or argument that [the Agency] did not have the salary funds to delay implementation of the furloughs until the [Panel] had ruled."[35] But it fails to explain why the Agency was required to do so in order to establish a necessary-functioning defense. As such, this claim does not show that the Arbitrator misapplied the law.

Finally, the Union argues that, during arbitration, the Agency did not "dispute that if the DOD[-]mandated furlough time remained at [eighty-eight] hours, the SPORT [bargaining-unit employees] starting on July 21 . . . would [not] have affected the necessary functioning of the [A]gency," and that the Agency's "entire argument was based on an assertion [that] the DOD would reduce the number of furlough days and [as a result] the SPORT controllers would not be able to support" the Agency's flight testing.[36] However, the Union does not explain how these claims are relevant to the necessary-functioning analysis. Accordingly, these claims are insufficient to establish that the award is contrary to law.

Accordingly, we deny the Union's contrary-to-law exception.

B. The Arbitrator did not base the award on a nonfact.

The Union also argues that the Arbitrator relied on a nonfact in concluding that implementation of the furloughs on July 8 was necessary to the functioning of the Agency. 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.[37] The Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[38]

The Union's nonfact argument primarily restates the arguments in support of its contrary-to-law exception. But the Union argues that the "rational[e] that SPORT would have to close and would not be able to support the flying if the DOD reduced the furlough hours [if the Agency did not begin the furloughs on July 8] is simply not factual."[39] However, even assuming that this is a factual finding, the parties disputed it before the Arbitrator.[40] Accordingly, we hold that the Union's nonfact exception provides no basis for finding the award deficient. We therefore deny the Union's nonfact exception.

[27] *NTEU*, 64 FLRA at 129.
[28] *Id.* (citing *INS*, 55 FLRA at 904).
[29] *Id.* (quoting *INS*, 55 FLRA at 904).
[30] *Id.* at 130 (citing *U.S. DHS, U.S. CBP*, 62 FLRA 263, 266 (2007) (*CBP*); *INS*, 55 FLRA at 904).
[31] *Id.*
[32] 62 FLRA 263.
[33] 55 FLRA 892.
[34] *CBP*, 62 FLRA at 266; *INS*, 55 FLRA at 904.
[35] Exceptions at 6.
[36] *Id.*
[37] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[38] *E.g., Int'l Bhd. of Elec. Workers, Local 26*, 67 FLRA 455, 457 2014) (citing *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012)).
[39] Exceptions at 9.
[40] *See AFGE, Local 1770*, 67 FLRA 372, 373-74 (2014) ("Even assuming that the [a]rbitrator's determination . . . is a factual finding, because the parties disputed that matter before the [a]rbitrator, his resolution of that dispute provides no basis for finding the award deficient.") (citing *AFGE, Local 1770*, 67 FLRA 93, 94 (2012)).

Moreover, as we have not set aside the Arbitrator's merits determination, we need not consider the Union's requests, in its exceptions, that we remand the case to the Arbitrator to fashion a remedy and modify his order that the Union pay arbitration costs.

IV. Decision

We deny the Union's exceptions.