68 FLRA No. 160

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
LEEDS, MASSACHUSETTS
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R1-274
(Union)

0-AR-5033

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DECISION

September 30, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The grievant is the Union president. She spends sixty percent of her workweek on official time and the remainder of the workweek performing clinical duties for the Agency as a psychologist. The Union filed a grievance alleging that the Agency violated the parties' agreement and Agency policies by failing to give the grievant a performance appraisal plan (PAP) with accurate and attainable performance standards. Arbitrator Sharon Henderson Ellis sustained the grievance. In her award, the Arbitrator ordered the Agency to modify two standards in the grievant's PAP.

The question before us is whether the award is inconsistent with management's right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the Agency does not allege or demonstrate that the pertinent provisions of the parties' agreement are unenforceable under § 7106(b) of the Statute, the answer is no.

[1] 5 U.S.C. § 7106(a)(2)(B).

II. Background and Arbitrator's Award

The grievant spends sixty percent of her workweek conducting Union-representational duties on official time. She spends the remaining forty percent performing clinical duties as a consultation/liaison psychologist at the Agency's medical center. The instant dispute arose when the Agency gave the grievant her 2013 PAP.

The Union filed a grievance making a variety of complaints about the PAP. As relevant here, the grievance alleged that the PAP "includes standards or elements that are unrealistic and unattainable,"[2] in violation of Articles 6 and 18 of the parties' agreement, Agency Memorandum 05-22, and Agency Handbook 5013, Part I (Agency policies). The grievance requested that the Agency remove the standards and/or elements. The matter was ultimately referred to the Arbitrator.

Before the Arbitrator, the parties stipulated to the following issue, as relevant here: "Did the [Agency] violate Article 6 and/or Article 18 of the [parties' a]greement and/or [Agency p]olicies . . . when it issued the . . . [2013 PAP]? If so, what shall be the remedy?"[3]

Article 6, Section 1 provides, in relevant part, that "all employees shall be treated fairly and equitably and without discrimination . . . [and the Agency] will endeavor to establish working conditions, which will be conducive to enhancing and improving employee's morale and efficiency."[4] And Article 18, Section 2 states that "[t]he performance appraisal system will provide for . . . the establishment of performance standards which will be based upon the requirements of the employee's position."[5] The Agency polices also set forth guidelines for issuing performance appraisal plans and standards. Specifically, Section 4a of Agency Memorandum 05-22 states that "[a] written performance plan for each employee will be developed based on the *requirements* of the employee's position."[6]

The Arbitrator denied the grievance in most respects. But she sustained the grievance's claim that the Agency violated the parties' agreement and two Agency policies by issuing a PAP with "unrealistic and unattainable" performance elements and standards.[7] The Arbitrator framed the claim as: "Do aspects of the [PAP]

[2] Award at 18.
[3] *Id.* at 1.
[4] *Id.* at 3-4.
[5] *Id.* at 4.
[6] *Id.* at 25 (internal quotation marks omitted).
[7] *Id.* at 18; *see id.* at 18-25.

contravene the terms of the [parties' a]greement, the [Agency] Handbook, or [Agency] Memo 5-22?"[8]

The Arbitrator first considered the PAP's new "[p]roductivity [s]tandard,"[9] namely, that the grievant was required to "[s]chedule[] at least one patient for psychological testing per week."[10] She found that the grievant's official union duties placed time constraints on the grievant's clinical schedule during the workweek. For this reason, the Arbitrator concluded that the grievant could not be expected to meet the same standard as other employees in her position who do not spend sixty percent of their workweeks on official time. Accordingly, she found that the new productivity standard should be removed.

The Arbitrator next addressed the PAP's new "[d]ocumentation [s]tandard."[11] This standard required that the grievant follow a specific procedure for scheduling patient "consults" – i.e., "requests from physicians or others that a veteran be seen for a psych[iatric] or neuro-psych[iatric] evaluation."[12] The Arbitrator found that the grievant was not required to schedule consults during eleven of the twelve months of her performance year. Because scheduling consults was not a requirement of the grievant's position for most of the performance year, the Arbitrator determined that it should not be part of her PAP.

As a remedy for the aspects of the grievance she sustained, the Arbitrator ordered the Agency to modify the language of the "[p]roductivity [s]tandard"[13] in the grievant's 2013 PAP by returning to the standard set forth in her 2012 PAP. Regarding the "[d]ocumentation [s]tandard,"[14] she ordered that the language "related to scheduling consults . . . be stricken."[15]

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

[8] *Id.*at 18.
[9] *Id.*
[10] *Id.* at 19 (emphasis omitted).
[11] *Id.* at 23.
[12] *Id.* at 24.
[13] *Id.* at 18.
[14] *Id.* at 23.
[15] *Id.* at 28.

III. Analysis and Conclusion: The Agency does not demonstrate that the award is inconsistent with management's right to assign work under § 7106(a)(2)(B) of the Statute.

The Agency argues that the award is inconsistent with management's right to assign work under § 7106(a)(2)(B) "by determining the content of performance standards" and requiring the Agency to modify the grievant's PAP.[16] The Union claims that the Agency did not argue that the contract provision that the Arbitrator enforced was *not* negotiated under § 7106(b).[17] Where an exception alleges that an arbitrator's award is inconsistent with management rights, the Authority first assesses whether the award affects the exercise of the asserted management right.[18] If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[19] When an agency files a management-rights exception to an award enforcing a contract provision, the agency must allege not only that the award affects management rights,[20] but also that the relevant contract provision is not enforceable under § 7106(b).[21]

Even assuming that the award affects management's right to assign work under § 7106(a)(2)(B),[22] the Agency does not allege that the Arbitrator was enforcing contract provisions – Articles 6 or 18 – that were not negotiated under § 7106(b). Consequently, the Agency has implicitly conceded that Articles 6 and 18 are enforceable under § 7106(b).[23] As contract provisions negotiated under § 7106(b) are exceptions to management's rights under § 7106(a), we find that the Agency fails to demonstrate that the award is inconsistent with the management's right to assign work

[16] Exception at 5.
[17] Opp'n at 12.
[18] *E.g.*, *U.S. Dep't of Transp., FAA*, 60 FLRA 159, 163 (2004).
[19] *E.g.*, *id*.
[20] *E.g.*, *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 241 (2011) (*IRS*).
[21] *See, e.g.*, *U.S. DOJ, Fed. BOP*, 68 FLRA 311, 315 (2015) (Member Pizzella dissenting) (holding that when agency files management-rights exception to award enforcing contract provision, agency must also allege that provision is not enforceable under § 7106(b)); *U.S. DHS, U.S. CBP*, 66 FLRA 634, 638 (2012) (holding that without allegation that contract provisions were not negotiated under § 7106(b), "management-rights exceptions fail as a matter of law"); *IRS*, 66 FLRA at 242 (holding that by failing to allege that arbitrator enforced provisions that were not negotiated under § 7106(b), agency implicitly conceded that provisions were enforceable under § 7106(b)).
[22] *IRS*, 66 FLRA at 242 (citing *SSA*, 65 FLRA 339, 341 (2010)) (assuming effect on asserted management rights when reviewing exceptions).
[23] *Id.*

under § 7106(a)(2)(B). Accordingly, we deny the Agency's exception.

The dissent raises a number of objections that the dissent has raised in previous cases.[24] As the majority explained in those cases, the dissent's objections lack merit.[25]

IV. Decision

We deny the Agency's exception.

Member Pizzella, dissenting:

As I noted in *U.S. OPM*,[1] it is my view that "'*no basis* appears in the CSRA *for a challenge* to a [performance] standard,' '*in the absence of* a removal or [demotion]'" action by an agency.[2]

Despite the fact that "[t]he Authority has generally deferred to federal courts on this point,"[3] the majority here permits the Union president, Dr. Wendy LaValley (a neuro-psychologist[4]), to grieve the expectations that are set out in her performance standards and that are no different than those used to evaluate other clinical psychologists.[5]

Yet again, my colleagues refuse to even consider the Agency's argument, that Arbitrator Sharon Henderson Ellis' award is contrary to management's right to assign work under 5 U.S.C. § 7106(a)(2)(B), simply because the Agency does not use the majority's preferred "magic words."[6] As I have stated on several occasions, "I do not agree [with the majority] that an agency is required, in all circumstances, to allege that a contract provision applied by an arbitrator is not the type of contract provision that falls within § 7106(b) of the Statute in order to argue that an award is contrary to law."[7]

Dr. LaValley spends sixty percent (60%) of her workweek not on her duties as a neuro-psychologist for the Veterans Administration Medical Center in Central Western Massachusetts, but on activities for the National Association of Government Employees, Local R1-274.[8] That leaves her with *only sixteen hours* for patient care in any given workweek.[9] The Agency does not interfere with how she uses her time and does not disagree that what is expected of her should be "*proportional* to the time she [actually works]."[10]

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[24] Dissent at 5-6 (employees cannot grieve their performance standards); *id.* (Authority consistently held that employees cannot grieve their performance standards); *id.* (Agency properly raised a management-rights objection despite failure to argue that agreement provision involved was not negotiated under § 7106(b)).

[25] *See U.S. OPM*, 68 FLRA 1039, 1041-42 (2015) (Member Pizzella dissenting) (nothing in language or legislative history of relevant statutory provisions demonstrates that content of performance standards is not grievable); *id.* at 1040-42 (Authority precedent affirms grievability of content of performance standards); *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 602-03 (2014) (Member Pizzella dissenting) (to demonstrate that award is deficient on management-rights grounds, an excepting party must, as a threshold matter, allege that award affects a management right under § 7106(a) and that disputed contract provision does not fall within subsections of § 7106(b)).

[1] 68 FLRA 1039, 1044-48 (2015) (Dissenting Opinion of Member Pizzella).

[2] *Id.* at 1046 (quoting *Lovshin v. Dep't of the Navy*, 767 F.2d 826, 833 n.7 (Fed. Cir. 1985) (citing *Alfred v. HEW*, 1 M.S.P.R. 317 (1980)).

[3] *Id.* at 1047 (citations omitted).

[4] Award at 19.

[5] *Id*. at 21

[6] *NTEU v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) (quoting *U.S. Dep't of Commerce v. FLRA*, 672 F.3d 1095, 1102 (D.C. Cir. 2012)).

[7] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 606 (2014) (Dissenting Opinion of Member Pizzella) (internal quotation marks omitted); *accord U.S. DOJ, Fed. BOP*, 68 FLRA 311, 317 (2015) (Dissenting Opinion of Member Pizzella).

[8] Award at 19.

[9] *Id*.

[10] *Id*. at 21 (emphasis added).

It is quite telling, therefore, that Dr. LaValley decided to devote even more time away from her clinical duties to argue that the standards established by her supervisor were not to her liking (even though she was never rated adversely or otherwise under those standards and even though it took her over two months to provide comments back to her supervisor concerning her standards after she was invited to do so).[11] Arbitrator Ellis found Dr. LaValley's grievance to be quite "unusual" because it challenged "whether the . . . *standards* . . . are *appropriate, realistic, or attainable*" rather than "*how* an appraisal was conducted" or *the rating* received.[12]

As discussed above, the U.S. Court of Appeals for the Federal Circuit[13] has long held, and the Authority has long deferred,[14] that the content of performance standards may not be grieved. It was Dr. LaValley's choice entirely to devote more than sixty percent (60%) of her workweek to Union business. But official time is not duty time.[15]

Dr. LaValley had another option. According to the Office of Personnel Management, "employees who spend . . . a significant amount of time [on union official time] . . . *cannot*, and should not, *be given performance appraisal ratings* of record."[16] The grievant simply could have requested that she not be rated against those standards for the performance year.

Therefore, to the extent Arbitrator Ellis sustained this grievance, which challenged the "standards themselves,"[17] and directed the Agency to "modif[y]" those standards,[18] the award is contrary to law.[19]

Thank you.

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[11] *Id*. at 7-10.
[12] *Id*. at 27 (emphasis added).
[13] *Lovshin*, 767 F.2d at 833 n.7.
[14] *U.S. OPM*, 68 FLRA at 1047 (Dissenting Opinion of Member Pizzella) (citations omitted).
[15] *See Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 464 U.S. 89, 105 (1983).
[16] Performance Management, 60 Fed. Reg. 43,936-01, 43,937 (Aug. 23, 1995) (emphasis added).
[17] Award at 27.
[18] *Id*. at 28.
[19] *Lovshin*, 767 F.2d at 883 n.7; *U.S. OPM*, 68 FLRA at 1048 (Dissenting Opinion of Member Pizzella).