69 FLRA No. 59

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 3307
(Union)

0-AR-5120

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DECISION

June 2, 2016

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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

Arbitrator William E. Hartsfield issued an award finding that the Agency violated Article 32(G) (Article 32) of the parties' collective-bargaining agreement (CBA) by failing to notify an employee (the grievant) at the earliest practicable date whether it would, or would not, propose discipline for an incident that he had been involved in. There are two substantive questions before us.

The first question is whether the award is contrary to law because it conflicts with management's rights to take disciplinary action and assign work under § 7106(a)(2)(A) and (B), respectively, of the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the Agency has failed to properly raise a claim that Article 32 is not enforceable under § 7106(b) of the Statute, the Agency's management-rights arguments fail as a matter of law. Therefore, the answer is no.

The second question is whether the award fails to draw its essence from Article 2, Section A of the CBA, which – according to the Agency – requires that the CBA "be interpreted in a manner not inconsistent with federal law."[2] Because the Agency's essence argument is premised on its claim that the award is contrary to § 7106 of the Statute – a claim that we reject – the answer is no.

II. Background and Arbitrator's Award

The grievant – a Border Patrol agent – was involved in an on-duty use-of-force incident (the incident). The Agency suspended the grievant's law-enforcement status and assigned him to administrative duties, pending an investigation into his involvement in the incident. While he was assigned to administrative duties, the grievant could not earn certain premium pay, including administratively uncontrollable overtime (AUO).

The Union filed a grievance requesting, in relevant part, that the Agency reinstate the grievant to his regular duties. The parties submitted the grievance to arbitration. At the time of the arbitration hearing – approximately one year after the grievant's reassignment – the grievant remained on administrative duties, and the Agency still "had not notified [the grievant] whether or not it would discipline him for the incident."[3]

As relevant here, the parties stipulated to the following issue before the Arbitrator:

> Did the Agency violate any law, rule, regulation, provisions of the [CBA] and/or any other agreement of the parties when it placed [the grievant] on administrative duties rendering him ineligible to earn AUO, night differential, [Fair Labor Standards Act] pay, Sunday pay, holiday pay, or any other premium pay?[4]

The Agency also raised the following issue for resolution: "Do the Union's proposed issues and remedy violate the Agency's statutory[,] nonnegotiable right[s] to assign work and determine its internal security practices under . . . § 7106" of the Statute?[5]

Before the Arbitrator, the Union contended that the Agency's unreasonable delay in investigating the incident violated Article 32 and constituted an unjustified or unwarranted personnel action. Article 32 states, in pertinent part, that the Agency "shall furnish employees with notices of proposed disciplinary/adverse actions at the earliest practicable date after the alleged offense has been committed and made known to the [Agency]."[6]

[1] 5 U.S.C. § 7106(a)(2)(A) & (B).

[2] Exceptions Br. at 16.
[3] Award at 28.
[4] *Id.* at 26; *see also id.* at 2.
[5] *Id.* at 3.
[6] *Id.* at 6.

Relying on a different arbitrator's previous award, the Union argued that Article 32 obligates the Agency to notify an employee under investigation, at the earliest practicable date, whether it will, *or will not*, propose discipline. And the Union argued that the Agency's "delay in completing the administrative investigation . . . rises to the level of an unjust[ified] and unwarranted personnel action."[7]

The Arbitrator found that the Agency had the authority, under § 7106(a) of the Statute, to suspend the grievant's law-enforcement status and to assign him to administrative duties. The Arbitrator further found, however, that Article 32 "resulted from negotiations permitted by . . . § 7106(b),"[8] and constituted a procedure or an appropriate arrangement as defined in § 7106(b)(2) and (3) of the Statute, respectively. The Arbitrator, citing arbitration awards identified by the Union, found that Article 32 "requires the Agency to notify [an] employee being investigated[,] at the earliest practicable date[,] either that discipline is proposed or that no discipline is proposed."[9] Based on the record evidence, the Arbitrator then determined that the Agency should have notified the grievant whether it would, or would not, propose discipline six months after it "obtained control over the matter under investigation."[10] The Arbitrator concluded that the Agency failed to do so and, thus, violated Article 32.

Additionally, the Arbitrator found that the Agency's violation of Article 32 was an unjustified or unwarranted personnel action that directly resulted in the withdrawal of the grievant's pay, allowances, or differentials. The Arbitrator directed the Agency to make the grievant whole.

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

[7] Union's Post-Hr'g Br. at 3.
[8] Award at 14, 25, 27.
[9] *Id.* at 27 (citation omitted).
[10] *Id.* at 28.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[11]

First, the Agency contends that the Arbitrator's interpretation of Article 32 – as applying to even situations "*where discipline is not imposed*"[12] – fails to draw its essence from the CBA because such an interpretation is inconsistent with Article 32's plain wording and bargaining history.[13] At arbitration, the Union argued that the Arbitrator should interpret Article 32 as applying even where discipline is not ultimately imposed.[14] Thus, the Agency should have, and could have, argued at arbitration that Article 32 does not apply to such situations. But there is no indication in the record that the Agency did so. Therefore, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar this portion of the Agency's essence exception, and we dismiss it.[15]

Next, the Agency argues that Article 32, as interpreted by the Arbitrator, is not enforceable under § 7106(b) as a procedure or an appropriate arrangement.[16] But, as established above, at arbitration, the Agency was aware of the Union's proposed interpretation of Article 32. Therefore, the Agency should have known to argue that adopting the Union's proposed interpretation would result in Article 32 not being enforceable under § 7106(b). Because there is no evidence that the Agency

[11] 5 C.F.R. §§ 2425.4(c), 2429.5.
[12] Exceptions Br. at 17-18.
[13] *Id.* at 17-20.
[14] Union's Post-Hr'g Br. at 32 ("The Agency may also argue that since . . . Article [32] does not specifically relate to situations where the Agency opts to take no action, it is not applicable here. Such an argument is . . . unavailing. . . . While it is true that Article 32[] does not specifically state what happens if the Agency takes no action or if no proposal is issued, 'timeliness' is its essence and timeliness is incorporated into the CBA."); *id.* at 37-38 (asking the Arbitrator to adopt another arbitrator's findings, including her findings that "[t]o interpret Article 32[] as applying only when notices of disciplinary or adverse actions have been issued ignores the due[-]process and 'speedy[-]trial' aspect of this language," and that Article 32 "can also be construed to provide due process by way of notification at the earliest practicable date for employees when no disciplinary or adverse action has been issued.").
[15] *See AFGE, Local 1945*, 67 FLRA 257, 257 (2014).
[16] Exceptions Br. at 14-15.

made such an argument below, we will not consider the Agency's § 7106(b) claim on exceptions.[17]

The Agency further claims that the Arbitrator's conclusion – "that the Agency committed an unjustified and unwarranted personnel action by keeping [the g]rievant on administrative-duty status when it failed to complete its . . . investigation within six months" – interferes with management's right to take disciplinary action under § 7106(a)(2)(A) of the Statute.[18] In response, the Union alleges that the Agency failed to raise this argument before the Arbitrator, and has failed to raise a statutory right-to-discipline argument in any of the "other similar grievances" before other arbitrators.[19] However, as demonstrated by our analysis in Section IV.A. below, it is unnecessary to determine whether the Agency argued before the Arbitrator that the award would interfere with management's right to take disciplinary action under § 7106(a)(2)(A) of the Statute.[20] Thus, we assume, without deciding, that the Agency made such an argument.[21]

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law because it impermissibly interferes with management's rights to take disciplinary action[22] and assign work[23] under § 7106(a)(2)(A) and (B) of the Statute, respectively. 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, but defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are based on nonfacts.[24]

Under the Authority's well-established precedent, when a party alleges that an arbitrator's award is contrary to § 7106(a) of the Statute, the Authority first assesses whether the award affects the exercise of the asserted right.[25] If the award affects the right, then the Authority examines, as relevant here, whether the award provides a remedy for a contract provision negotiated under § 7106(b).[26] The Authority places the burden on the party arguing that the award is contrary to management rights to allege not only that the award affects a right under § 7106(a), but also that the enforced provision is not the type of contract provision that falls within § 7106(b) of the Statute.[27]

Here, we assume, without deciding, that the award affects management's rights to take disciplinary action and assign work,[28] and, thus, we turn to whether the award enforced a provision negotiated under § 7106(b). In this regard, the Arbitrator determined that Article 32 constitutes a procedure or an appropriate arrangement under § 7106(b)(2) or (3), respectively.[29] While the Agency now claims that Article 32 does not fall within § 7106(b),[30] that claim is not properly before us, for the reasons discussed in Section III above. As a result, the Agency's management-rights arguments fail as a matter of law,[31] and we deny those exceptions.[32]

Additionally, we note that, as part of its argument concerning the right to assign work, the Agency states that "the right to assign employees includes the right to refrain from assigning employees."[33] To the extent that the Agency's statement is intended to

[17] *See NTEU, Chapter 83*, 68 FLRA 945, 948 (2015) (*NTEU*) (Member Pizzella dissenting) ("Where an agency should have known to argue to an arbitrator that a contract provision was not negotiated under § 7106(b), and the agency did not do so, the Authority will not consider that argument for the first time on exceptions to the arbitrator's award."); *U.S. DHS, U.S. CBP*, 66 FLRA 634, 637 (2012) (*CBP*) ("[T]he Authority has barred agency exceptions claiming that contract provisions were not enforceable under § 7106(b), where those claims were not made at arbitration.").

[18] Exceptions Br. at 12.

[19] Opp'n Br. at 16.

[20] *See, e.g., NFFE, Local 2189*, 68 FLRA 374, 376 (2015) (*Local 2189*) (citing *U.S. DOD, Ala. Air Nat'l Guard, Montgomery, Ala.*, 58 FLRA 411, 413 n.4 (2003); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Ctr., New Cumberland, Pa.*, 55 FLRA 1303, 1305 n.4 (2000)).

[21] *See id.* (citing *USDA, U.S. Forest Serv., Law Enf't & Investigations, Region 8*, 68 FLRA 90, 92-93 (2014)).

[22] Exceptions Br. at 12-14

[23] *Id.* at 9-12.

[24] *E.g., U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 69 FLRA 10, 14 (2015) (Member Pizzella dissenting on other grounds).

[25] *Id.* at 14 (citing *SSA, Off. of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 602 (2014) (*SSA New Orleans*) (Member Pizzella dissenting)).

[26] *Id.* (citing *SSA New Orleans*, 67 FLRA at 602).

[27] *Id.* (citing *SSA New Orleans*, 67 FLRA at 602; *U.S. DOJ, Fed. BOP*, 68 FLRA 311, 315 (2015) (Member Pizzella dissenting)).

[28] *See, e.g., NAIL, Local 5*, 67 FLRA 85, 89 (2012).

[29] Award at 15, 27.

[30] Exceptions Br. at 14-15.

[31] *E.g., CBP*, 66 FLRA at 638 (without an allegation that the contract provision was not negotiated under § 7106(b), "management-rights exceptions fail as a matter of law").

[32] *See NTEU*, 68 FLRA at 950 (denying contrary-to-management-rights exception because agency was barred from arguing that the contract provision at issue was not negotiated under § 7106(b)).

[33] Exceptions Br. at 11 (quoting *U.S. DOJ, Fed. BOP, Metro, Det. Ctr., Guaynabo, P.R.*, 57 FLRA 331, 332 (2011) (Chairman Cabaniss dissenting)).

raise a separate claim that the award conflicts with the right to assign employees under § 7106(a)(2)(A), that claim fails for the same reasons.

For the foregoing reasons, we deny the Agency's contrary-to-law exceptions.

B. The award does not fail to draw its essence from the CBA.

The Agency argues that the award fails to draw its essence from the CBA.[34] Specifically, citing Article 2, Section A of the CBA, the Agency contends that "the CBA must be interpreted in a manner not inconsistent with federal law,"[35] and that the award conflicts with this provision because the Arbitrator's interpretation of Article 32 impermissibly interferes with management's rights.[36] However, as discussed in Section IV.A. above, the Agency has failed to demonstrate that the award conflicts with management rights, so we have rejected the premise of this essence argument. Accordingly, the argument is without merit, and we deny this portion of the Agency's essence exception.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[34] *Id.* at 16-20.
[35] *Id.* at 16.
[36] *Id.* at 16-17.

Member Pizzella, dissenting:

The legendary vaudeville actor, W.C. Fields, once observed: "If at first you don't succeed, try, try again. Then quit. There's no point in being a damn fool about it."[1]

Mr. Fields makes a good point, but it is apparent that his advice has not been heeded by the American Federation of Government Employees National Border Patrol Council (AFGE Council) and the U.S. Customs and Border Protection (CBP).

This is at least the fifth time that the AFGE Council has argued with CBP about what Article 32.G. of their collective-bargaining agreement (CBA) means.[2] Two of those made their way to arbitrators while the parties argued over the same question here.[3]

Article 32 is not complex or multi-faceted. It addresses ***one, and only one, subject*** − "[*d*]*isciplinary and* [*a*]*dverse* [*a*]*ctions.*"[4] As relevant here, Article 32.G. simply states that CBP will issue an employee accused of misconduct a notice of disciplinary action "at the earliest practicable date."[5] And though the parties do not agree on much, they agree on two points − Article 32 concerns management's § 7106(a)(2)(A) right to discipline and was negotiated pursuant to 5 U.S.C. § 7106(b).

Nonetheless, the majority remains unconvinced that the record shows that Article 32 was indeed a provision that was negotiated pursuant to § 7106(b).

In this case, I once again challenge the manner in which the majority imposes a rigid two-step requirement[6] which (when taken together with the court-rejected "waiting for Godot"[7] abrogation standard) creates hurdles which are impossible for an agency to surmount when the agency seeks to argue that an arbitrator's award impermissibly interferes with a management right. As I noted in *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, Louisiana* (*SSA*),[8] the Authority's decisions in *FDIC, Division of Supervision & Consumer Protection, San Francisco Region* (*FDIC*)[9] and *U.S. EPA* (*EPA*),[10] and later cases,[11] did not impose a requirement for a party to "allege that the provision 'is not the type of contract provision that falls within § 7106(b) of the [Federal Service Labor-Management Relations] Statute,' before it may argue that an award constrains a management right.'"[12] No such requirement has ever been established by the Authority, and if such a requirement were established it would "not [be] flexible enough to accommodate all of the contexts in which an [a]gency may be forced to argue that an arbitral award is contrary to law."[13]

The majority's approach effectively whipsaws CBP from even arguing that the award impermissibly affects its management rights to discipline and assign work because CBP did not argue that Article 32 is "not enforceable under § 7106(b)"[14] and presupposes that only the interpretation of a provision that "was *not* negotiated under § 7106(b)"[15] may run counter to management's § 7106(a) rights. That notion is supported by nothing more precedential than the majority's continued repetition of it. As I pointed out in *SSA*, the majority's approach is simply "bad law, and it is not consistent with the rationale that was articulated by my colleagues . . . in *FDIC* and *EPA*."[16]

The majority's rigid approach ignores that, even when a provision has been negotiated pursuant to § 7106(b), an arbitrator's interpretation of that provision may still interfere with management's § 7106(a) rights when, just to name a few examples, the arbitrator's determination is "inconsistent or illegal," fails to apply the "pertinent" agreement, or "awards a remedy that is not even provided for in that agreement."[17]

Even if I were to presume, as do my colleagues, that our precedent requires CBP "to argue that . . . Article 32 [is] not [] enforceable under § 7106(b)," the

[1] http://www.brainyquote.com/quotes/quotes/w/wcfields108002.html.
[2] *See* Union's Post-Hr'g Br. at 27.
[3] *Id*.
[4] Award at 6 (emphasis added).
[5] *Id*.
[6] *See U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 69 FLRA 10, 17 (2015) (Dissenting Opinion of Member Pizzella); *U.S. Dep't of VA, Med. Ctr., Leeds, Mass.*, 68 FLRA 1057, 1059-60 (2015) (Dissenting Opinion of Member Pizzella); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot Red River, Texarkana, Tex.*, 67 FLRA 609, 617-18 (2014) (Dissenting Opinion of Member Pizzella).
[7] *AFGE Council of Prison Locals, Local 4052*, 68 FLRA 38, 46 (2014) (Dissenting Opinion of Member Pizzella).
[8] 67 FLRA 597, 607 (2014) (Dissenting Opinion of Member Pizzella).
[9] 65 FLRA 102, 107-08 (2010) (Chairman Pope concurring).
[10] 65 FLRA 113, 116-19 (2010) (Member Beck concurring).
[11] *SSA*, 67 FLRA at 606 (citing *U.S. Dep't of the Treasury, IRS, Wage & Investment Div.*, 66 FLRA 235, 242 (2011); *U.S. Dep't of HHS, Substance Abuse & Mental Health Services Admin.*, 65 FLRA 568, 571 (2011)).
[12] *Id.*
[13] *Id*.
[14] Majority at 4.
[15] *Id*. at 6 n.31.
[16] *SSA*, 67 FLRA at 605.
[17] *Id*.

majority ignores the parties' shared understanding that Article 32 affects management's right to discipline and was negotiated under § 7106(b).

Just four months ago in *AFGE, National Border Patrol Council, Local 2455*[18] (another dispute between the *same* parties), the majority accepted, without question, the argument made by the AFGE Council that Article 32 "operates as a *waiver of* [CBP's] *right to discipline*,"[19] because it was negotiated under § 7106(b). To make that point, the attorney for AFGE Council, Julie Jayakumar, relied on a series of earlier arbitration awards (between various locals of the AFGE Council and the CBP) to establish that the parties have always understood that Article 32 affects the Agency's right to discipline and was negotiated pursuant to § 7106(b).[20] CBP did not object to the AFGE Council's characterization of the parties' common understanding or its reliance on the prior cases to establish these points.

It should be no surprise, then, that CBP argues the converse of the same point here and relies on the same series of earlier arbitration awards.[21] It should also be no surprise that the AFGE Council, again represented by its attorney Julie Jayakumar, would not object that CBP relies on the same awards to demonstrate that Article 32 affects management's right to discipline and was negotiated pursuant to § 7106(b). The parties' mutual understanding was acknowledged by the Arbitrator who "remained mindful" that Article 32 "resulted from negotiations permitted by 5 U.S.C. § 7106(b)."[22]

Only the majority seems to be confused on this point.

The Agency's arguments that the Arbitrator's award interferes with its rights to discipline and to assign work should be addressed on their merits and not summarily dismissed.

Equally disconcerting, however, is that the majority will not even decide whether or not "the award affects management's rights to take disciplinary action and assign work."[23] This is not a tough call. Either the Agency argued that the award interferes with its management rights or it did not. As discussed above, the parties agree, and do not dispute, that the award would interfere with management's right to take discipline. Accordingly, there is no justification for the majority to "assume[] without deciding"[24] and to refuse to make the decision whether or not the Agency made arguments concerning management's rights.

Without making a decision on such important matters, the Authority fails in its responsibility "to give clear guidance to the labor-management-relations community on how to proceed in other cases in the future."[25] I made this same point just two days ago in *U.S. DHS, U.S. CBP*: "I do not believe that the Authority 'facilitates and encourages the amicable settlement' of disputes when we fail to make decisions that ought to be made."[26]

Thank you.

[18] 69 FLRA 171,172 (2016) (Member Pizzella concurring).
[19] *Id*. (emphasis added).
[20] *Id*.
[21] Award at 23.
[22] *Id.* at 14.
[23] Majority at 5.
[24] *Id*.
[25] 69 FLRA 412, 417 (2016) (Concurring Opinion of Member Pizzella).
[26] *Id*. at 418.