

71 FLRA No. 212

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
U.S. PARK POLICE
(Agency)

and

FRATERNAL ORDER OF POLICE
U.S. PARK POLICE LABOR COMMITTEE
(Union)

0-AR-5603

DECISION

November 19, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

The Agency began consistently enforcing an existing policy requiring its law-enforcement officers to pay for traffic and parking fines that they incur while operating Agency vehicles. The Agency asserted that it had to enforce the policy to comply with applicable government-wide regulations. The Union – claiming that the parties had established a past practice of *not* holding officers personally responsible for traffic and parking fines – filed a grievance alleging that the Agency did not provide it with notice and an opportunity to bargain before enforcing the policy. Arbitrator Homer C. La Rue issued an award finding that the parties had a past practice of not enforcing the policy and that the Agency violated the parties’ collective-bargaining agreement by failing to bargain with the Union before changing that practice.

The question before us is whether the award is contrary to law. We find that any past practice of not enforcing the traffic-and-parking-fines policy was contrary to the General Services Administration’s (GSA’s) Motor Vehicle Management regulations (the motor-vehicle regulations).¹ Therefore, the Agency was not required to engage in pre-implementation bargaining before discontinuing that unlawful practice, and the Agency did not violate the parties’ agreement.

¹ 41 C.F.R. §§ 102-34.235, 34.245.

Accordingly, we find that the Arbitrator erred as a matter of law, and we set aside the award.

II. Background and Arbitrator’s Award

The Agency is a unit of the National Park Service of the U.S. Department of the Interior. The Union represents law-enforcement officers (officers) employed by the Agency. This case involves officers working in the Washington, D.C. metropolitan area.

The Agency provides vehicles for officers to use during their tours of duty. When officers commit traffic or parking violations while operating an Agency vehicle, the resulting citation is generally sent directly to the Agency. In 2011, the Agency issued a memorandum notifying officers that when an officer “operates a [g]overnment vehicle, it is [the officer’s] responsibility to pay any fine associated with a [traffic or parking] violation,” unless the officer was “responding to [an] emergency” (the 2011 memo).² The memo further states that officers can “elect to contest the moving violation” in the relevant jurisdiction but will be “responsible for . . . payment of the fine” if found guilty.³

In May 2018, the Agency received a traffic citation showing that a speed-zone camera identified an Agency vehicle exceeding the posted speed limit. The Agency provided the citation to the officer operating the vehicle along with a directive that he either successfully contest the violation or pay the fine, as required by the 2011 memo. The Union then filed an institutional grievance alleging that the Agency’s enforcement of the 2011 memo violated Articles 2.1, 3.2, and 3.4 of the parties’ agreement. Article 2.1 stipulates that applicable laws and regulations govern the parties’ agreement,⁴ while Articles 3.2 and 3.4 require the Agency to bargain with the Union before changing a condition of employment unless law or regulation permits otherwise.⁵ The Agency denied the grievance, and the parties proceeded to arbitration.

² Award at 11.

³ *Id.*

⁴ Exceptions, Ex. A, Collective-Bargaining Agreement at 6 (“[T]he administration of all matters covered by this [agreement] . . . [is] governed by . . . existing or future [federal] laws or regulations . . .”).

⁵ *Id.* at 7 (“Management shall negotiate . . . in accordance with law, rule, [r]egulation . . . and government-wide mandate.”); *id.* (“[P]olicies pertaining to [conditions of employment] . . . may only be modified . . . by regulations of higher authority or via procedures set forth in this [agreement].”).

The relevant issue before the Arbitrator was whether the Agency “violat[ed] an existing past practice” by enforcing the 2011 memo “without bargaining over the matter with the [Union].”⁶

The Arbitrator noted that under the motor-vehicle regulations, federal employees “must obey all [state and local] motor[-]vehicle[-]traffic laws” while performing their official duties in a government vehicle, and they are “personally responsible” for the “payment” of traffic and parking fines, unless the violation was “required as part of [their] official duties.”⁷ Citing the motor-vehicle regulations, the Arbitrator found that the Agency had the authority to enforce the 2011 memo because it was “based on a government-wide mandate.”⁸ However, the Arbitrator also found – due in part to the Agency’s accumulation of a significant amount of unpaid traffic fines – that the Agency had failed to consistently enforce the 2011 memo’s requirements. Therefore, the Arbitrator held that the Agency had engaged in a binding past practice, from 2011 to 2018, of not requiring officers to pay their traffic and parking fines.⁹ And the Arbitrator concluded that the Agency’s failure to provide notice to, and bargain with, the Union before discontinuing that practice – and enforcing the 2011 memo – violated Articles 2.1, 3.2, and 3.4, of the parties’ agreement.¹⁰

As remedies, the Arbitrator directed the Agency to “return to the status quo – that is the past practice of nonenforcement of the [2011 memo]” – and “bargain[] in good faith to impasse” before enforcing it.¹¹

On March 2, 2020, the Agency filed exceptions to the award. On April 1, 2020, the Union filed an opposition to the Agency’s exceptions.

III. Analysis and Conclusion: The Arbitrator’s award is contrary to government-wide regulation.

The Agency argues that the award is contrary to the motor-vehicle regulations.¹² Specifically, the Agency contends that any past practice of not enforcing the 2011 memo was contrary to the motor-vehicle regulations, and, therefore, the Arbitrator’s status quo ante remedy – which restores that practice – “would

require [the Agency] to violate [g]overnment-wide regulation.”¹³

When an exception involves an award’s consistency with regulation, the Authority reviews any questions of law raised by the exception and the award de novo.¹⁴ The Authority has held that an agency may implement a change to correct an unlawful practice without first bargaining over the change.¹⁵

In addition, the Authority will not order a status quo ante remedy that would result in the reinstatement of an illegal practice.¹⁶

The motor-vehicle regulations – a subset of the GSA’s Federal Management Regulation¹⁷ – are government-wide regulations applicable to executive agencies in the federal government.¹⁸ As noted above, the motor-vehicle regulations specify that employees operating government vehicles “must obey all [state and local] motor[-]vehicle[-]traffic laws,” and those who violate such laws, when “not required as part of [their] official duties,” are “personally responsible” for the “payment” of any imposed fine or penalty.¹⁹

Here, the Agency’s “past practice” of leaving citations unpaid or otherwise not holding officers personally responsible for their traffic and parking fines was inconsistent with the motor-vehicle regulations; therefore, the Agency was permitted to discontinue that practice and enforce the 2011 memo – as that memo

⁶ Award at 4.

⁷ *Id.* at 9-10 (quoting 41 C.F.R. § 102-34.235); *see also id.* at 10 (noting that the motor-vehicle regulations also require federal employees to pay any parking fines they accrue while operating a government vehicle (citing 41 C.F.R. § 102-34.245)).

⁸ Award at 31 (citing 41 C.F.R. part 102-34).

⁹ *Id.*

¹⁰ *Id.* at 37.

¹¹ *Id.*

¹² Exceptions at 6-7.

¹³ *Id.* at 7.

¹⁴ *AFGE, Local 1633*, 70 FLRA 752, 753 (2018). In applying the standard of de novo review, the Authority determines whether an arbitrator’s legal conclusions are consistent with the applicable legal standard. *AFGE, Local 1916*, 64 FLRA 1171, 1172 (2010).

¹⁵ *U.S. DHS, U.S. ICE*, 70 FLRA 628, 630 (2018) (*ICE*) (Member DuBester dissenting); *USDA, Food Safety & Inspection Serv., Boaz, Ala.*, 66 FLRA 720, 723 (2012) (*USDA*); *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1527-28 (1994) (*Portsmouth*).

¹⁶ *ICE*, 70 FLRA at 630; *USDA*, 66 FLRA at 723; *U.S. DOJ, U.S. INS, El Paso Dist. Office*, 34 FLRA 1035, 1048 (1990) (*El Paso*).

¹⁷ The Federal Management Regulation “prescribes policies concerning property management and related administrative activities.” 41 C.F.R. §§ 102-2.10, 2.20.

¹⁸ *Id.* § 102-2.20; *see also* Award at 31-32 (noting that the motor-vehicle regulations constitute a “government-wide mandate”).

¹⁹ 41 C.F.R. § 102-34.235 (“If you are fined or otherwise penalized for an offense you commit while performing your official duties, but which was not required as part of your official duties, payment is your personal responsibility.”); *see also id.* § 102-34.245 (“If you are fined for a parking violation while operating a [g]overnment motor vehicle, you are responsible for paying the fine and will not be reimbursed.”).

implemented the motor-vehicle regulations.²⁰ Consequently, the Agency was not required to bargain before enforcing the 2011 memo,²¹ and the Arbitrator's status quo ante remedy would result in the reinstatement of an unlawful practice.²²

The Union contends that the motor-vehicle regulations do not apply because when an officer is ticketed, the resulting fine is "issued to the Department of Interior [or the Agency], not to the officer."²³ We reject this contention as incompatible with the plain wording of the motor-vehicle regulations, which emphasize that "payment is [the] *personal* responsibility" of the individual who "violate[d] State or local traffic laws."²⁴

Based on the above, we set aside the award.²⁵

IV. Decision

We set aside the award.

²⁰ Award at 31-32 (finding that the 2011 memo "is based on a government-wide mandate" issued by the GSA (citing 41 C.F.R. part 102-34)).

²¹ See *Portsmouth*, 49 FLRA at 1530-31 (holding that the agency was not required to bargain before terminating a past practice inconsistent with statute and government-wide regulation).

²² See *El Paso*, 34 FLRA at 1048 (denying request for a status quo ante remedy that would have required the agency to return to a practice inconsistent with 31 U.S.C. § 1344).

²³ Opp'n Br. at 13.

²⁴ 41 C.F.R. § 102-34.235 (emphasis added); see also *id.* § 102-34.245. The Union also argues that the motor-vehicle regulations are "inapplicable" to this matter because the 2011 memo "does not carry out the purpose" of those regulations. *E.g.*, Opp'n Br. at 13; see also *id.* at 14 (arguing that the 2011 memo enforces a requirement that differs from the requirements in the motor-vehicle regulations). However, citing the motor-vehicle regulations, the Arbitrator specifically held that the 2011 memo "is based on a government-wide mandate." Award at 31-32 (citing 41 C.F.R. part 102-34). To the extent the Union's argument challenges that holding, we dismiss it as an untimely exception to the award. See 5 C.F.R. § 2425.2(b) (time limit for filing exceptions to an arbitration award is thirty days after the date of service of the award); *U.S. Dep't of the Army, U.S. Army Aviation Ctr. of Excellence, Fort Rucker, Ala.*, 71 FLRA 734, 735 n.14 (2020) (Member DuBester dissenting) (dismissing opposition arguments as untimely filed exceptions).

²⁵ See *ICE*, 70 FLRA at 630 (setting aside award where the arbitrator found that the agency violated the parties' agreement by not bargaining before changing an unlawful practice and awarded a status quo ante remedy). Because we find that the award is contrary to government-wide regulation and set it aside, it is unnecessary to address the Agency's remaining exceptions. Exceptions at 8-10 (arguing that the award is contrary to 5 U.S.C. § 7106), *id.* at 12-17 (arguing that the award is based on nonfacts); see, e.g., *U.S. Dep't of the Army, XVII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172, 173 (2017).

Member DuBester, dissenting in part:

I agree with the majority that the Agency's practice of not enforcing the 2011 memo requiring employees to bear responsibility for motor-vehicle violations is contrary to government-wide regulations. As I have said previously, "[i]f an existing practice is contrary to a government-wide regulation, an agency may take legitimate steps to conform to lawful requirements."¹ And, even when an agency has no duty to bargain over the substance of a change to correct an unlawful past practice, it must still bargain over the impact and implementation of the change.²

But as I have also previously noted, the Authority has held that an agency must notify a union before changing an unlawful practice, when this will not delay discontinuation of the practice and would not be otherwise contrary to law.³ Here, the record indicates that the Agency had ample opportunity to provide the Union with notice and an opportunity to bargain before changing the practice. Therefore, I believe that the Arbitrator correctly concluded that the Agency violated its duty to bargain.⁴

¹ *U.S. DHS, U.S. ICE*, 70 FLRA 628, 634 & n.48 (2018) (*ICE*) (Dissenting Opinion of Member DuBester).

² *Id.* (citing *Portsmouth Naval Shipyard, Portsmouth N.H.*, 49 FLRA 1522, 1527-28 (1994); *U.S. Army Adjutant Gen., Publ'n Ctr., St. Louis, Mo.*, 35 FLRA 631, 634 (1990)).

³ *Id.* at 635 (citing *U.S. Patent & Trademark Office*, 31 FLRA 952, 955-56, 981-82, 984 (1988) (ordering agency to cease and desist from changing certain law-school-tuition-payment practices, to conform to legal requirements, without first notifying and bargaining with union); *Dep't of the Interior, U.S. Geological Survey, Conservation Div., Gulf of Mexico Region, Metairie, La.*, 9 FLRA 543, 546 n.9 (1982) (finding agency committed ULP by failing to first notify and give union opportunity to bargain over change in an overtime pay practice that was contrary to statute)).

⁴ However, for the reasons stated in my dissent in *ICE*, I would modify the award to set aside the status quo ante remedy. 70 FLRA at 636-37 (Dissenting Opinion of Member DuBester).