72 FLRA No. 54

INDEPENDENT UNION
OF PENSION EMPLOYEES FOR
DEMOCRACY AND JUSTICE
(Union)

and

PENSION BENEFIT GUARANTY CORPORATION
(Agency)

0-AR-5634

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DECISION

May 18, 2021

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

I. Statement of the Case

In this case, we consider the extent to which agencies and unions can negotiate over performance-awards committees without violating management's rights under § 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute).

During negotiation of a new collective-bargaining agreement between the parties, the Agency informed the Union that it was terminating a special-achievement-award program for bargaining-unit employees that existed under Article 3, Section 2 of the parties' recently expired agreement. The Union filed a grievance arguing that provisions in the expired agreement were preserved until superseded by a new agreement, and the Agency's termination of the special-achievement-award article constituted an unlawful repudiation.

Arbitrator Charles Feigenbaum issued an award denying the grievance, finding that two of the performance-award provisions within Article 3, Section 2 were contrary to management rights under § 7106 of the Statute.[1] The Union filed exceptions arguing that the Arbitrator failed to identify a management right that Article 3, Section 2(A) violated; misapplied the test for whether Article 3, Section 2(D) affected the right to determine the budget; and was biased.

For the following reasons, we grant the Union's exception regarding Article 3, Section 2(A) and set aside that portion of the award, but we deny the remaining exceptions.

II. Background and Arbitrator's Award

Before the expiration of the parties' 2011 agreement, the Union provided notice of its intent to renegotiate. After the parties began negotiations, the Agency informed the Union that it was terminating the special-achievement-awards (SAA) program memorialized in Article 3, Section 2 of the 2011 agreement. The Agency asserted that this termination was pursuant to its right to unilaterally terminate "any permissive or illegal" provisions.[2] The Union filed a grievance alleging that the Agency unlawfully repudiated Article 3, Section 2 because, according to the Union, the entirety of the 2011 agreement—including Article 3, Section 2—remained in effect after its expiration.

The parties submitted the dispute to arbitration, and the Arbitrator framed the issue as follows: "Did the Agency violate the [parties' agreement] and Statute when it canceled Article 3, [Section 2] of the Agreement?"[3] In addressing that issue, the Arbitrator focused exclusively on two sections of Article 3—Sections 2(A) and 2(D). Article 3, Section 2(A) provides that "[the Joint Awards Committee (JAC)] will decide all individual and group awards for bargaining[-]unit employees."[4] Article 3, Section 2(D) provides, in relevant part: "[t]he monies allocated for bargaining[-]unit Special Achievement Awards will be at least 9% of all monies allocated for all awards."[5]

Before addressing those articles, the Arbitrator found that the Union properly notified the Agency of its intent to renegotiate pursuant to the continuance clause in the parties' agreement.[6] As the continuance clause was

[1] 5 U.S.C. § 7106.

[2] Award at 3 (quoting Agency memorandum regarding termination of the SAA program).

[3] *Id.* at 2.

[4] *Id.* at 14 (quoting Art. 3, § 2(A)).

[5] *Id.* at 7 (quoting Art. 3, § 2(D)).

[6] Article 56, Section 3(A) of the parties' 2011 agreement states that "[i]n the event that the [p]arties elect to renegotiate the [a]greement, the current terms of the [a]greement will remain in effect until superseded by a new [a]greement." Award at 5. We note that, while its holding is not an issue in this case, the Authority recently issued guidance concerning continuance provisions, such as Article 56, Section 3(A), in *USDA, Off. of the Gen. Couns.*, 71 FLRA 986 (2020) (then-Member DuBester dissenting). There, the Authority stated that the period for agency-head review under 5 U.S.C. § 7114(c) begins on the first day that the terms of the expired collective-bargaining

properly invoked, the Arbitrator concluded that the Agency could not unilaterally terminate Article 3, Section 2 regardless of whether it was "a permissive or mandatory subject of bargaining."[7] Accordingly, the Arbitrator proceeded to analyze whether the terminated provisions were unlawful.

Addressing Article 3, Section 2(A), the Arbitrator held that "the extensive control that [it] grants to the JAC violates [the Agency's] management rights with respect to the Special Achievement Awards program."[8] He reasoned that the JAC's discretion "would infringe on the Agency's right to determine the criteria for awarding employees."[9]

As for Article 3, Section 2(D), the Arbitrator concluded that it impermissibly interfered with management's right to determine its budget under § 7106(a)(1) of the Statute because it prescribed a specific percentage—9%—to be allocated for a specific program. He also noted that the 9% requirement affected the amount the Agency could allocate for other performance awards, including special-achievement awards for non-bargaining-unit employees.

Based on these findings, the Arbitrator concluded that the Agency did not violate the parties' agreement or the Statute when it terminated the SAA program and denied the grievance.

The Union filed exceptions to the award on May 18, 2020, and the Agency filed its opposition on June 17, 2020.

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

The Union argues that the Arbitrator was biased on the grounds that he engaged in "improper advocacy" on behalf of the Agency by suggesting a legal argument that, according to the Union, he later relied on in finding for the Agency.[10] The Union alleges that—during a break in the hearing and in the presence of one of the Union's attorneys—the Arbitrator suggested a legal argument to the Agency.[11] The Union also describes a "long and tortured history" between the Arbitrator and the Union, including the Union's unsuccessful attempts to have him removed from the arbitration panel and the Arbitrator ruling in favor of the Agency in the present case, as well as two prior cases.[12]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[13] Here, the "long and tortured history" between the Union and the Arbitrator—including the Union's efforts to remove him from the panel and the two prior awards cited by the Union—existed before the start of arbitration.[14] The improper advocacy allegedly occurred during a break in the hearing and in the presence of the Union's attorneys, which presented an opportunity to raise this argument before Arbitrator. Because the Union could have raised its bias argument before the Arbitrator, but did not do so, we dismiss this exception as barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[15]

IV. Analysis and Conclusions

A. The Arbitrator's finding that Article 3, Section 2(A) violated a management right is contrary to law.

The Union argues that the portion of the award concerning Article 3, Section 2(A) is contrary to law because the Arbitrator failed to specify which management right under § 7106(a) of the Statute the provision violated.[16] The Arbitrator held that Article 3, Section 2(A) "violate[d] [the Agency's] management rights with respect to the Special Achievement Awards program."[17] However, the Arbitrator did not identify a management right under § 7106 that Section 2(A) impacted.[18] Contrary to the Arbitrator's holding,[19] and the Agency's contention,[20] there is no management right to "determine the criteria for performance awards" in the Statute.[21] As there is no legal basis for the Arbitrator's

agreement are extended pursuant to a continuance provision. *Id.* at 989.
[7] Award at 7.
[8] *Id.* at 16.
[9] *Id.* at 15.
[10] Exceptions Br. at 17-19.
[11] *Id.* at 19.
[12] *Id.* at 17-19.
[13] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Loc. 3448*, 67 FLRA 73, 73-74 (2012).
[14] Exceptions Br. at 17-19.
[15] *U.S. DHS, CBP*, 68 FLRA 824, 825 (2015) (Member Pizzella dissenting).
[16] Exceptions Br. at 14.
[17] Award at 16.
[18] *See id.* at 14-16.
[19] *Id.* at 15.
[20] The Agency argues in its opposition to the Union's exceptions that the article "restricts the Agency's right to determine the criteria for performance awards." Opp'n at 25.
[21] *Cf. NTEU v. FLRA*, 793 F.2d 371, 375 (D.C. Cir. 1986) (holding that determinations as to the amount to award for superior performance does not fall under management's right to assign and direct employees work under §7106(a)); *NAGE, Loc. R1-203*, 55 FLRA 1081, 1083 (1999) (Chair Segal concurring) (holding that "management's rights to direct employees and assign work do not extend to the decision to grant an award");

conclusion, we grant the Union's exception and set aside the portion of the award finding that Article 3, Section 2(A) violated a nonexistent management right.[22]

B. The Arbitrator did not err in finding that Article 3, Section 2(D) interferes with management's right to determine the budget under § 7106(a)(1).

The Union argues that the Arbitrator's conclusion that Article 3, Section 2(D) violates management's right to determine the budget under § 7106(a)(1) is contrary to law.[23] Specifically, it alleges that the Arbitrator misapplied the Authority's test for determining an effect on that right.[24] The Union also argues that, because the 9% requirement applies only if the Agency decides to allocate funds for performance awards, the provision does not affect management's right to determine its budget.[25]

The Authority uses a two-part test to determine whether a provision affects management's right to determine its budget.[26] As relevant here, a provision affects the right to determine the budget if the provision attempts "to prescribe [a] particular program[] or operation[] the agency would include in its budget or to prescribe [an] amount to be allocated in the budget."[27]

As noted above, Section 2(D) required the Agency to provide "at least 9% of all monies allocated for all awards" for the SAA program.[28] The Authority addressed similar proposals in *IFPTE, Local No. 1* (*Norfolk*) [29] and *NAGE, Local R1-144, Federal Union of Scientists & Engineers* (*Naval Underwater*).[30] In *Norfolk*, the relevant proposal established a formula that set a maximum funding allowance for performance awards at 1.5% of base payroll.[31] The Authority found that the proposal "establishe[d] a specific budgetary restriction on the funding levels for performance awards and that . . . limitation directly affect[ed] the amount of money the [a]gency may include in its budget for that purpose."[32] The Authority held that this proposal—even "expressed solely in percentage terms"—affected management's right to determine its budget.[33]

Similarly, in *Naval Underwater*, the Authority considered a proposal requiring that whenever the agency allocated awards funding to a particular group of employees, the awards budget for that group would be 1.5% of base payroll.[34] The Authority held that even if the agency could potentially avoid the 1.5% requirement by electing not to fund any performance awards for a particular group, the proposal "prescribe[d] an amount to be allocated in the [a]gency's budget for a particular program or operation" and, therefore, affected management's right to determine the budget.[35]

Here, although Section 2(D) does not set a specific amount for the Agency's SAA program, it operates in the same manner as the proposals in *Naval Underwater* and *Norfolk* by limiting how the Agency can allocate funds—specifically, by preventing it from allocating to special-achievement awards less than "9% of all monies allocated for all awards."[36] The Union argues that the Agency could avoid the special-achievement-awards funding requirement by electing not to fund *any* awards.[37] However, in *Naval Underwater*, the Authority rejected a similar argument stating that even if the agency could avoid the requirement, "the question of whether the funding requirement violates the [a]gency's right to determine its budget would still exist."[38] Accordingly, consistent with precedent, we find that the provision satisfies the budget

NFFE, Loc. 1256, 31 FLRA 1203, 1206-07 (1988) (holding that proposals concerning decisions to reward superior performance do not affect the right to direct employees and assign work).

[22] *See U.S. Dep't of the Air Force, Luke Air Force Base, Ariz.*, 65 FLRA 820, 822 (2011) (where arbitrator based his award on a nonexistent right of temporary employees to grieve their terminations, the Authority set aside the arbitrator's "clearly erroneous" legal conclusion); *U.S. Small Bus. Admin.*, 55 FLRA 179, 181 (1999) (setting aside a portion of an award as contrary to law after finding that the arbitrator had no statutory basis for the awarded remedy).

[23] Exceptions Br. at 9-10.

[24] *Id.*

[25] *Id.* at 9-14.

[26] *AFGE, AFL-CIO*, 2 FLRA 603, 607-08 (1980) (*Wright-Patterson*); *see also U.S. DHS, U.S. CBP*, 61 FLRA 113, 116 (2005) (*CBP*) (noting that the *Wright-Patterson* test applies to both proposals and provisions).

[27] *Wright-Patterson*, 2 FLRA at 608; *see also CBP*, 61 FLRA at 116; *NAGE, Loc. R14-52*, 41 FLRA 1057, 1065-66 (1991) (*Red River*). The other prong concerns proposals or provisions that create a significant and unavoidable cost increase for the agency. *See CBP*, 61 FLRA at 116 (under the second part, "where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits[,] the Authority will find that a proposal/provision affects an agency's right to determine the budget").

[28] Award at 7 (quoting Art. 3, § 2(D)).

[29] 38 FLRA 1589, 1595 (1991).

[30] 38 FLRA 456, 475-76 (1990).

[31] 38 FLRA at 1595.

[32] *Id.*

[33] *Id.* at 1594.

[34] *Naval Underwater*, 38 FLRA at 475-76 ("If management decides to give awards within any given grouping, then the budget allocations in that grouping will be 1.5% of base aggregate payroll.").

[35] *Id.* at 478-80.

[36] Award at 7 (quoting Art. 3, § 2(D)).

[37] Exceptions Br. at 13-14.

[38] *Naval Underwater*, 38 FLRA at 479.

test and affects management's right to determine its budget.[39]

The Union did not argue to the Arbitrator, and does not now contend before the Authority, that Article 3, Section 2(D) constitutes either an appropriate arrangement[40] or a procedure[41] under § 7106(b) of the Statute. Accordingly, we find that the Arbitrator did not err in concluding that Section 2(D) impermissibly interferes with management's right to determine the budget under § 7106(a)(1) of the Statute,[42] and we deny this exception.[43]

V. Decision

We grant the Union's exception with regard to Article 3, Section 2(A) and set aside that portion of the award. We dismiss the Union's exception concerning arbitral bias and deny the Union's remaining exceptions.

[39] *See Wright-Patterson*, 2 FLRA at 607-08.
[40] 5 U.S.C. § 7106(b)(3).
[41] *Id.* § 7106(b)(2).
[42] *See U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Portland Dist.*, 60 FLRA 595, 597 (2005) (declining to consider whether a provision was negotiated pursuant to subsections of § 7106(b) where the union did not raise those subsections); *U.S. DOD, Ala. Air Nat'l Guard, Montgomery, Ala.*, 58 FLRA 411, 413 n.3 (2003) (declining to address § 7106(b)(1) or (b)(3) where those subsections were not raised).
[43] The Union makes two arguments regarding the scope of the award. First, the Union alleges that the award fails to draw its essence from the parties' agreement because the Arbitrator "should only have struck down the provisions of Article 3, Section 2 [that] he found to have violated a management right," rather than the entirety of the SSA program memorialized in all of Article 3, Section 2. Exceptions Br. at 17. However, the Union does not support this contention by identifying any articles, provisions, or wording of the parties' agreement that the Arbitrator allegedly misinterpreted. *USDA, Farm Serv. Agency, Okla. State Off., Stillwater, Okla.*, 56 FLRA 679, 681 (2000) (denying an essence exception where the agency did not "specify any provision from which the award allegedly fails to draw its essence"). Consequently, the Union has not established that the award fails to draw its essence from the parties' agreement and we deny this exception. Second, the Union alleges that the Arbitrator exceeded his authority by failing to resolve issues submitted to arbitration—specifically, "whether the cancellation of the [SSA] program repudiated the [parties' agreement] and constituted an unfair labor practice." Exceptions Br. at 16. The Arbitrator framed the issue to include the questions of whether the Agency violated the Statute "when it canceled Article 3, [Section] 2," and, if so, "what shall be the remedy." Award at 2. As discussed above, the Arbitrator concluded that the Agency lawfully terminated Article 3, Section 2(A) and Section 2(D), and thus, he awarded no remedy. *Id.* at 16. While we set aside the Arbitrator's conclusion regarding Section 2(A), we find the award directly responsive to the issue that the Arbitrator framed. Accordingly, we deny this exception. *See U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 55 FLRA 169, 171-72 (1999) (denying an exception that argued the arbitrator exceeded her authority by failing to resolve an issue submitted to arbitration where the parties did not stipulate to the issue and the award was responsive to the arbitrator's framing of the issue).

Chairman DuBester, dissenting, in part:

I agree with Parts III and IV.A. of the majority's decision, as well as the decision's denial of the Union's essence and exceeds-authority exceptions.[1] However, unlike the majority, I believe the Arbitrator erred by finding that Article 3, Section 2(D) of the parties' collective-bargaining agreement interferes with management's right to determine its budget.

As relevant here, the Authority has held that a proposal affects management's right to determine the budget if it "prescribes the programs and operations to be included in the agency's budget or prescribes the amount to be allocated for them."[2] The Authority has held that this test should be applied narrowly, and that it renders nonnegotiable "only those proposals addressed to the budget per se, not those that would result in expenditures by an agency and, consequently, have an impact on the budget process."[3]

The provision at issue requires the Agency to provide "at least 9% of all monies allocated for all awards" to a special-achievement-awards (SAA) program.[4] The Arbitrator concluded that this provision impermissibly interferes with management's right to determine its budget because it "suffers from the same defect" as proposals at issue in *NAGE, Local R1-144, Federal Union of Scientists & Engineers* (*Naval Underwater*).[5] In that decision, the Authority found nonnegotiable a proposal requiring the agency to fund its overall awards budget for any particular group of employees in an amount equal to 1.5% of the employees' aggregate base payroll. And in affirming the Arbitrator's conclusion on this point, the majority relies upon *Naval Underwater*, as well as another Authority decision that found a similar proposal nonnegotiable on the same grounds.[6]

In my view, however, the proposals at issue in those decisions are distinguishable from the provision before us, which does not dictate the amount the Agency must allocate towards its overall awards budget, but instead merely determines the portion of this budgeted amount that will be devoted to a particular type of award. And in that sense, I believe the Union correctly asserts that the provision terminated by the Agency is more analogous to the proposal at issue in *AFGE, Local 3836* (*AFGE*).[7]

The proposal in *AFGE* required the agency to "allocate an amount of its overall performance awards budget to the bargaining unit" in the same amount as it allocates to any other pay pool.[8] The Authority concluded that the proposal did not interfere with the agency's right to determine its budget because the agency "retain[ed] the right to determine how much money is budgeted for performance-based awards," while the proposal was "concerned only with the relative proportion" of the budgeted amount that the agency could devote to a particular purpose.[9] Indeed, in *IFPTE, Local No. 1* – one of the decisions upon which the majority relies – the Authority distinguished the proposal at issue in *AFGE* because it "preserved the agency's discretion to determine the amount of money to be budgeted for performance awards," whereas the proposal it found nonnegotiable "prescrib[ed] the maximum funding level for unit employee performance awards."[10]

Based on these decisions, and guided by the principle that we should narrowly apply the test governing this question, I would conclude the Arbitrator erred by finding that the provision governing the SAA program offended the Agency's right to determine its budget. Accordingly, I would vacate this portion of the award.

[1] *See* Majority at 6 n.43.
[2] *NAGE*, *Loc. R14-52*, 41 FLRA 1057, 1066 (1991) (quoting *U.S. Dep't of HHS, SSA, Balt., Md.*, 41 FLRA 224, 231 (1991)).
[3] *NAGE, Loc. R1-144, Fed. Union of Scientists & Eng'rs*, 38 FLRA 456, 478 (1990).
[4] Award at 7.
[5] *Id.* at 12.
[6] Majority at 5 (citing *IFPTE, Loc. No. 1*, 38 FLRA 1589, 1595 (1991)).
[7] 31 FLRA 921 (1988).
[8] *Id.* at 927.
[9] *Id.* at 931.
[10] 38 FLRA at 1595.

Member Abbott, dissenting in part:

I cannot join the majority in their conclusion that the Arbitrator failed to identify a management right under § 7106 that was impacted by Article 3, Section 2(A).[1]

Heeding criticism from the U.S. Court of Appeals for the District of Columbia Circuit[2] and Members Beck and Pizzella[3] concerning the hyper-technical wording requirements imposed by earlier cohorts of the Authority, this Authority has held that we "will not penalize a party for failing to invoke 'magic words'" when we determine whether an argument has been raised adequately to the Authority.[4]

The Authority has held that the processes of how to rate, the criteria used to rate, and how to reward performance are encompassed under the right to direct employees and assign work.[5] Here, the Arbitrator specifically found that Section 2(A) "infringe[d] on the Agency's right to determine the criteria for awarding employees"[6] and "does not permit the Agency to decide whether a bargaining[-]unit employee deserves a[n award], or the specific amount to be awarded the employee."[7] Thus, it is clear to me, and reasonable to conclude, that the Arbitrator was referring to the right to direct employees and assign work.

Accordingly, the Arbitrator *did* identify a management right impacted by Section 2(A). I would thus deny the Union's exception.[8]

[1] Majority at 4.

[2] *See NTEU v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) (*NTEU*) ("A party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority.").

[3] *See U.S. Dep't of VA, Med. Ctr., Topeka, Kan.*, 70 FLRA 151, 153 (2016) (*Topeka VA*) (Dissenting Opinion of Member Pizzella) ("The United States Court of Appeals for the District of Columbia Circuit has made clear that the Authority may not require parties to invoke magic words in order to adequately raise an argument before the Authority." (quoting *NTEU*, 754 F.3d at 1040) (internal quotation marks omitted)); *AFGE, Loc. 1738*, 65 FLRA 975, 976 (2011) (Separate Opinion of Member Beck) ("Our recently revised regulations do not require parties to invoke any particular magical incantations when filing exceptions.").

[4] *U.S. Dep't of Educ., Off. of Fed. Student Aid*, 71 FLRA 1105, 1107 n.24 (2020) (then-Chairman Kiko dissenting) (citing *U.S. Dep't of Treasury, IRS*, 70 FLRA 806, 809 n.34 (2018) (then-Member DuBester dissenting)).

[5] *SSA*, 71 FLRA 495, 498 (2019) (then-Member DuBester dissenting in part) ("The Authority has long held that management's rights to direct employees and assign work include the right to establish performance standards in order to supervise and determine the quantity, quality, and timeliness of work required of employees." (citations omitted)); *AFGE, Nat'l Council of Field Lab. Locs., Loc. 2139*, 57 FLRA 292, 294 (2001) (finding that the right to assign work includes the right to establish criteria governing employee's performance of their duties); *AFGE, Loc. 225*, 56 FLRA 686, 688 (2000) ("As the proposals would establish the particular levels of performance required to achieve a particular summary rating for overall performance, they affect management's rights to direct employees and assign work." (citations omitted)); *AFGE, AFL-CIO, Locs. 112, 3269, 3383 & 3831*, 15 FLRA 906, 907 (1984) (finding a proposal that "prescribe[d] the overall performance appraisal an employee needs to attain in order to receive or be eligible for . . . a reward for superior performance . . . directly interferes with management's rights to direct employees and assign work").

[6] Award at 15.

[7] *Id.* at 16.

[8] *See USDA, Off. of Gen. Couns.*, 71 FLRA 986, 989 (2020) (then-Member DuBester dissenting) (finding that "an automatically renewed agreement is subject to agency-head review beginning 'the day after the expiration of the contractual window period for requesting renegotiation of the expiring agreement'").