

73 FLRA No. 120

UNITED STATES
DEPARTMENT OF THE ARMY
ARIZONA DEPARTMENT
OF EMERGENCY & MILITARY AFFAIRS
ARIZONA ARMY NATIONAL GUARD
(Agency)

and

ASSOCIATION OF
CIVILIAN TECHNICIANS
CHAPTER 61
(Union)

0-AR-5860

DECISION

July 19, 2023

Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Edward Scholtz found the Agency violated the parties' collective-bargaining agreement (CBA) and § 7116 of the Federal Service Labor-Management Relations Statute (the Statute) by rescinding an agreed-upon provision. The rescinded provision allowed dual-status technicians (technicians) who lost their military membership due to medical disability to delay their separation for a four-month period, renewable if required, until the Office of Personnel Management (OPM) adjudicated their disability-retirement claims.

The Agency excepted, arguing the award is contrary to law. As discussed below, we agree, and we vacate the award.

II. Background and Arbitrator's Award

The Agency employs technicians, who are required to maintain membership in the Arizona National

Guard as a condition of employment.¹ Under 32 U.S.C. § 709, technicians who lose military membership "shall be promptly separated from . . . technician (dual[-]status) employment by the adjutant general of the jurisdiction concerned."²

At one point, the National Guard Bureau (bureau) had a regulation that stated, in relevant part, "[t]he one exception to the requirement for prompt termination upon loss of military membership is in pending disability[-]retirement claims. Under these circumstances, a technician who has lost military membership may be retained until the OPM[] adjudication is received."³ On June 29, 2020, the bureau sent the Agency new regulatory guidance rescinding the existing regulation. The parties then engaged in impact and implementation bargaining and agreed to an August 10, 2021 memorandum (memorandum). The memorandum contained a provision (the provision) that allowed technicians who lose military membership due to medical disability to "request a four[-]month extension (renewable, if required) to accommodate [the] OPM disability determination."⁴

On March 15, 2022, the Agency notified the Union that it was rescinding the provision because it was contrary to 32 U.S.C. § 709.⁵ The Union filed a grievance, alleging the Agency violated the parties' CBA and § 7116 of the Statute by rescinding the provision. The grievance went to arbitration.

At arbitration, the Agency argued it was unlawful to retain technicians who have lost military membership pending an OPM disability-retirement decision. The Arbitrator disagreed, finding separations do not have to occur immediately upon the loss of military membership. Because 32 U.S.C. § 709 does not define the term "promptly," the Arbitrator reasoned that the parties were free to negotiate that term's meaning.⁶ As such, the Arbitrator concluded that the rescinded provision – allowing technicians to remain employed for four-month, renewable periods pending OPM's disability-retirement determinations – was not contrary to 32 U.S.C. § 709's requirement that the Agency "promptly separate[]" them.⁷ The Arbitrator concluded the Agency violated the Statute and the CBA by rescinding the provision.

The Agency filed exceptions to the award on February 2, 2023, and the Union filed an opposition to the Agency's exceptions on February 22, 2023.

¹ 32 U.S.C. § 709(b)(2).

² *Id.* § 709(f)(1)(A).

³ Award at 3 (quoting National Guard Bureau Technician Personnel Regulation 715 (July 13, 2007)).

⁴ Exceptions, Ex. 2, Memorandum (Memorandum) at 1.

⁵ *Compare* Memorandum at 1, *with* Exceptions, Ex. 3, Revised Memorandum at 1.

⁶ Award at 7-8.

⁷ *Id.*

III. Analysis and Conclusion: The award is contrary to law.

The Agency argues the award is contrary to law because it is not unlawful for an agency to fail to comply with a CBA provision that is contrary to law.⁸ In this regard, the Agency contends the rescinded provision is contrary to 32 U.S.C. § 709(f)(1)(A).⁹

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.¹⁰ In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.¹¹ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.¹² Although unlawfully repudiating a CBA provision is contrary to § 7116(a)(1) and (5) of the Statute, the Authority will not find unlawful repudiation where the repudiated provision is contrary to law.¹³

The Arbitrator found the Agency's rescission of the provision violated the parties' CBA and the Statute because the provision was consistent with 32 U.S.C. § 709.¹⁴ As noted above, the rescinded provision allows technicians who lose military membership to "request a four-month extension (renewable, if required) to accommodate OPM disability determination," thereby delaying their separations.¹⁵ Under 32 U.S.C. § 709(f)(1)(A), technicians who lose military membership "shall be promptly separated from . . . employment by the adjutant general of the jurisdiction concerned."¹⁶

Because 32 U.S.C. § 709 does not define "promptly," the Arbitrator found the parties had discretion to determine the meaning of "promptly" through negotiations. However, the Authority has held that "[w]here an agency's discretion is limited by . . . standards or procedures set forth in law or regulation, an agency may only bargain to the extent of that discretion."¹⁷ Thus, "bargaining [is] . . . foreclosed if a proposal is inconsistent with law."¹⁸

There is no indication in 32 U.S.C. § 709 that it provides agencies discretion to bargain over the meaning of the term "promptly." Consequently, we must assess

whether the rescinded provision is inconsistent with 32 U.S.C. § 709's terms.

As stated above, 32 U.S.C. § 709 does not define "promptly." Further, the Arbitrator and the parties do not cite – and we have not found – regulations, case precedent, or legislative history defining that term in the context of § 709. Where a statute does not define a pertinent term, the Authority has found it appropriate to consider dictionary definitions of that term.¹⁹

The dictionary defines "promptly" as "without delay."²⁰ Therefore, 32 U.S.C. § 709(f)(1)(A) requires technicians who lose military membership to be separated without delay. The rescinded provision effectively allows an indefinite deferral of separation in renewable, four-month increments, until OPM makes a disability-retirement determination. Putting the timeframe for separations in the hands of an outside agency, for a potentially indefinite period of time, conflicts with the notion of effecting separation "without delay." As such, the rescinded provision contradicts § 709(f)(1)(A)'s requirement that the Agency "promptly" remove technicians who lose military membership.

Because the rescinded provision is contrary to 32 U.S.C. § 709(f)(1)(A), the Agency's rescission of it

⁸ Exceptions Br. at 4-6.

⁹ *Id.*

¹⁰ *AFGE, Council 222*, 73 FLRA 54, 55 (2022).

¹¹ *Id.*

¹² *Id.*

¹³ *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, 65 FLRA 1052, 1054 (2011).

¹⁴ Award at 6-8, 10.

¹⁵ Memorandum at 1.

¹⁶ 32 U.S.C. § 709(f)(1)(A) (emphasis added).

¹⁷ *NAGE, Loc. R3-10*, 55 FLRA 839, 844 (1999).

¹⁸ *Ass'n of Civilian Technicians, Tex. Lone Star Chapter 100*, 55 FLRA 1226, 1229 (2000) (emphasis added).

¹⁹ *U.S. DHS, U.S. CBP*, 66 FLRA 745, 747 (2012).

²⁰ *Promptly*, Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/promptly> (last visited July 18, 2023).

was not an unlawful repudiation.²¹ Accordingly, we grant the Agency's exception and vacate the award.²²²³

IV. Decision

We vacate the award.

²¹ *NTEU*, 72 FLRA 537, 539 (2021) (Chairman DuBester concurring).

²² Because we vacate the award, we do not address the Agency's remaining exception. *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 574 n.18 (2018) (Member DuBester dissenting on other grounds) (finding it unnecessary to address the excepting party's remaining arguments after setting aside the award); Exceptions Br. at 6-7 (arguing the award is contrary to law because the Arbitrator awarded attorney fees "without making a factual finding that the[] [fees] were warranted in the interest of justice . . .").

²³ Consistent with her concurrence in *Laborers Int'l Union of N. Am., Loc. 1776*, 73 FLRA 591, 595 (2023) (Concurring Opinion of Member Kiko), Member Kiko reiterates that she respects the decision of the United States Supreme Court concerning whether Adjutants General are "subject to the authority of the [Federal Labor Relations Authority] when acting in their capacities as supervisors of [national guard] dual-status technicians." *Ohio Adjutant Gen.'s Dep't v. FLRA*, 143 S. Ct. 1193, 1201 (2023). Therefore, despite her previously expressed reservations on this issue, *see, e.g., U.S. DOD, Ohio Nat'l Guard*, 71 FLRA 829, 833 (2020) (Member Abbott concurring in part) (Dissenting Opinion of Chairman Kiko), *pet. for review denied sub nom. Ohio Adjutant Gen.'s Dep't v. FLRA*, 21 F.4th 401, 409 (6th Cir. 2021), *aff'd*, 143 S. Ct. 1193, 1201 (2023), Member Kiko no longer raises jurisdictional objections to the Authority's resolution of cases involving units of the national guard.