74 FLRA No. 12

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL #53
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

0-AR-5956

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DECISION

October 15, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

Arbitrator Joyce M. Klein issued an award finding the Agency violated §§ 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by failing to bargain with the Union over changes to employee awards resulting from the Agency's reorganization. As remedies, the Arbitrator directed prospective bargaining and issued a cease-and-desist order. The Union filed an exception arguing the award is contrary to law because the Arbitrator failed to award additional remedies. Because the Union does not establish that the award is deficient, we deny the exception.

II. Background and Arbitrator's Award

The Agency operates clinical contact centers that assist veterans in obtaining healthcare services. In 2021, the Agency initiated a reorganization that, in pertinent part, consolidated three clinical contact centers operating within the Black Hills, Minneapolis, and Nebraska-Western Iowa Health Care Systems, respectively. In conducting the reorganization, the Agency transferred employees to the consolidated clinical contact center (consolidated center), but did not change the location of affected employees' official duty stations.

The Agency provided notice of the reorganization to the Union before implementation and, following negotiations, the parties executed a memorandum of understanding. Neither the Agency's notice nor the memorandum referenced employee awards. Thereafter, the parties participated in unit-clarification proceedings before the Authority to determine which labor organization would represent employees at the consolidated center. As part of these proceedings, the parties stipulated that the consolidated center was "assigned to Minneapolis . . . for personnel[-]costing purposes," and, therefore, employees would "fall under a single budget regardless of their physical location."[2]

For the 2022 fiscal year, the Minneapolis Health Care System paid performance awards to bargaining-unit employees assigned to the consolidated center, regardless of their duty station. Article 27 of the parties' collective-bargaining agreement provides that "an employee who receives '[a]n annual rating of fully successful' or higher is eligible for 'award consideration,'" with each facility director determining the amount to be awarded, if any.[3] Under the Minneapolis Health Care System's award structure, qualifying employees at the consolidated center received performance awards equaling one to two percent of their base pay. As a result, some employees received smaller awards than they previously received from the Black Hills and Nebraska-Western Iowa Health Care Systems. Rather than using a percentage-based system, the Black Hills and Nebraska-Western Iowa Health Care Systems awarded flat sums based on the employee's annual rating, irrespective of salary.

The Union filed a grievance alleging the Agency committed an unfair labor practice by changing performance awards without providing notice and an opportunity to bargain. The grievance proceeded to arbitration, where the parties stipulated to the following issue: "Whether the [Agency] unilaterally implemented changes to the . . . Performance Awards Program . . . in violation of the [m]aster [a]greement and/or 5 U.S.C. [§§] 7116(a)(1) and (5)[, and i]f so, what shall the remedy be?"[4]

Addressing the Agency's duty to bargain, the Arbitrator observed that the Statute required the Agency to: (1) provide "sufficiently specific" notice of a contemplated change to conditions of employment;[5] and

[1] 5 U.S.C. §§ 7116(a)(1), (5).
[2] Award at 7.
[3] *Id.* (quoting Art. 27, § 1.G.) (internal quotation marks omitted); *see also id.* ("Each facility's director determines what amount, if any, will be granted to those employees covered by the facility's budget who receive eligible appraisal ratings.").
[4] *Id.* at 2.
[5] *Id.* at 18 (quoting *IRS (Dist., Region & Nat'l Off. Unit & Serv. Ctr. Unit)*, 10 FLRA 326, 327 (1982)) (internal quotation mark omitted).

(2) "bargain over the impact and implementation of a management decision" where the "reasonably foreseeable effects of that decision . . . were substantial and . . . evident."[6] Applying these principles, the Arbitrator found the Agency provided the Union with only "generalized notice" that the Minneapolis Health Care System would fulfill budgetary functions for the consolidated center due to the reorganization.[7] The Arbitrator determined that it "was not only foreseeable, but likely" that the reorganization would result in smaller performance awards for employees who, prior to the reorganization, received awards from the Black Hills and Nebraska-Western Iowa Health Care Systems.[8] The Arbitrator also determined the Agency's notice – which "did not explain that the re[organization] would result in . . . employees . . . receiving different bonuses"[9] – was "not sufficiently specific to provide the Union with a 'reasonable opportunity to request bargaining'" regarding the reorganization's impact on awards.[10]

At arbitration, the Agency argued that the parties' agreement did not require the Agency to administer awards based on an employee's duty-station location. In response, the Arbitrator explained that the Agency's argument, even if meritorious, would "not affect whether the Union [was] entitled to bargain over the impact of the . . . re[organization] . . . on" performance awards.[11]

Based on these findings, the Arbitrator concluded that the Agency violated §§ 7116(a)(1) and (5) of the Statute when it failed to bargain performance awards "as part of the re[organization] of" clinical contact centers.[12] In determining a remedy, the Arbitrator found retroactive relief inappropriate because it would "require all . . . employees affected by the re[organization]" to receive adjusted awards, to some employees' detriment.[13] Specifically, the Arbitrator noted that, if she were to direct status-quo-ante relief, some employees would receive increased performance awards, but other employees would "receiv[e] a smaller [performance awards] for fiscal year 2022."[14] Consequently, instead of directing retroactive relief, the Arbitrator issued a cease-and-desist order and directed the Agency to bargain over performance awards "going forward."[15]

The Union filed an exception to the award on March 20, 2024, and the Agency filed an opposition to the exception on April 24, 2024.

III. Analysis and Conclusion: The award is not contrary to law.

The Union argues the award is contrary to law because the Arbitrator failed to award several remedies the Union requested in its grievance.[16] 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.[17] 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.[18]

Where an arbitrator finds that a party has committed an unfair labor practice, the Authority defers to the arbitrator's judgment and discretion in the determination of the remedy.[19] Thus, the Authority upholds the arbitrator's remedial determination unless a party establishes either that the Statute compels a different, particular remedy, or that the arbitrator's remedial determination is "a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]."[20] The Authority has emphasized that making such a showing is a heavy burden.[21]

A. The Arbitrator did not err by denying the Union's request for a status-quo-ante remedy.

The Authority has held that, where management changes a condition of employment without fulfilling its obligation to bargain over the substance of the decision to make the change, a *status-quo-ante* remedy is appropriate in the absence of special circumstances.[22] Citing this principle, the Union argues the Arbitrator was required to award status-quo-ante relief, because the Agency did not bargain the change to performance awards and "failed to present any evidence of special circumstances."[23]

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[6] *Id.* (quoting *U.S. Customs Serv. (Wash., D.C.)*, 29 FLRA 891, 898 (1987)) (internal quotation marks omitted).
[7] *Id.*
[8] *Id.* at 19.
[9] *Id.* at 18 (finding Agency did not explain to Union that different systems would reward the same annual rating differently, resulting in awards of different monetary amounts across the three systems).
[10] *Id.*
[11] *Id.* at 19.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 20.
[16] Exceptions Br. at 5-8.
[17] *U.S. Dep't of the Treasury, IRS*, 73 FLRA 888, 889 (2024).
[18] *Id.*
[19] *AFGE, Council of Locs. 222*, 72 FLRA 738, 741 (2022) (citing *AFGE, Loc. 12*, 69 FLRA 360, 361 (2016) (*Loc. 12*)).
[20] *NTEU*, 66 FLRA 406, 408 (2011) (*NTEU IRS*) (quoting *NTEU v. FLRA*, 647 F.3d 514, 517 (4th Cir. 2011)) (internal quotation marks omitted).
[21] *NTEU*, 73 FLRA 315, 322 (2022) (*NTEU HHS*) (Chairman DuBester concurring on other grounds).
[22] *AFGE, Loc. 1415*, 69 FLRA 386, 391 (2016).
[23] Exceptions Br. at 6-7.

As noted, the Arbitrator determined that the *reorganization* was the operative change to employees' conditions of employment,[24] and that the Agency's duty to bargain consequently extended only to the reorganization's impact and implementation, including the "impact of the . . . re[organization] . . . on" performance awards.[25] The Arbitrator did not conclude the Agency failed to fulfill an obligation to bargain over the *substance* of any decision.

In support of its argument, the Union generally asserts that the "provision of awards does not involve the exercise of a reserved management right."[26] However, it fails to argue that the Arbitrator erred by not finding the Agency's bargaining failure related to a matter for which substantive bargaining was required.[27] Because the Agency's failure-to-bargain unfair labor practice, as found by the Arbitrator, did not concern a substantive bargaining obligation, the Union does not demonstrate that the Arbitrator was required to apply the Authority's special-circumstances test.

Additionally, the Union does not challenge the Arbitrator's finding that status-quo-ante relief was inappropriate because it would require retroactively increasing certain employees' awards while retroactively decreasing other employees' awards.[28] Deferring to the Arbitrator's finding, there is no basis for concluding that the Arbitrator's denial of status-quo-ante relief was a patent attempt to achieve ends other than those to effectuate the policies of the Statute.[29]

Accordingly, the Union does not establish that the Arbitrator's denial of its request for status-quo-ante relief is contrary to law.[30]

B. The Arbitrator did not err by declining to direct additional remedies.

The Union also asserts that the Arbitrator erred by not awarding a notice posting, a retroactive bargaining order, or make-whole relief.[31] Although the Union cites several Authority and federal court decisions finding that such relief was appropriately awarded under the circumstances presented by those cases, none of the cited decisions establishes that the Union is entitled to the identified remedies, as a matter of law, in this case.[32] Further, the Union does not argue, or provide a basis for finding, that the Arbitrator's denial of the Union's requested remedies was a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Statute.

Accordingly, we deny the Union's exception.[33]

[24] Award at 18 (noting grievance concerned whether Agency violated an obligation to "bargain over the 'impact and implementation of a management decision'"), *id.* at 19 (describing Agency's unfair labor practice as a failure to bargain over awards "as part of the re[organization]").

[25] *Id.* at 19.

[26] Exceptions Br. at 7.

[27] To the extent the Union's one-sentence assertion could be construed as raising this argument as part of its exception, we deny it as unsupported. 5 C.F.R. § 2425.6(e)(1) ("An exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground [for review]."); *Consumer Fin. Prot. Bureau*, 73 FLRA 663, 664 n.14 (2023) (denying argument under 5 C.F.R. § 2425.6(e) where agency provided no explanation as to how the award conflicted with the Statute).

[28] Award at 19.

[29] *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 436 (2010) (where excepting party did not challenge findings supporting arbitrator's remedial determination, Authority deferred to arbitrator's unchallenged findings and upheld remedy).

[30] *See NTEU IRS*, 66 FLRA at 408 (where arbitrator's refusal to award status-quo-ante relief was based in part on the negative effect such a remedy would have on a significant number of bargaining-unit employees, Authority found no basis for finding awarded remedies were a patent attempt to achieve ends other than those to effectuate the policies of the Statute); *NTEU*, 48 FLRA 566, 572 (1993) (denying exception arguing arbitrator required to award status-quo-ante remedy where excepting party did not establish that arbitrator's remedial determination was a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Statute).

[31] Exceptions Br. at 5, 7-8.

[32] *Id.* at 5 (citing *U.S. Dep't of VA, N. Ariz. VA Health Care Sys., Prescott, Ariz.*, 66 FLRA 963 (2012); *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996)); *id.* at 7 (citing *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 60 FLRA 456, 457 (2004); *FDIC, Wash., D.C. & FDIC, Okla. City, Okla.*, 48 FLRA 313 (1993)); *id.* at 8 (citing *AFGE, SSA Council 220, AFL-CIO*, 840 F.2d 925 (D.C. Cir. 1988)).

[33] *See NTEU HHS*, 73 FLRA at 322 (denying exception asserting arbitrator was required to direct make-whole relief, because exception neither demonstrated that "make-whole relief [was] compelled by law, rule[,] or regulation," nor that arbitrator's remedy was "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Statute"); *Loc. 12*, 69 FLRA at 362 (denying argument that arbitrator erroneously failed to order notice posting where excepting party did not identify any authority requiring that remedy); *NTEU IRS*, 66 FLRA at 408 (denying exception challenging arbitrator's unfair-labor-practice remedy where excepting party cited authorities finding status-quo-ante and make-whole relief "*appropriate*" but not mandated by law, rule, or regulation).

IV. Decision

We deny the Union's exception.