

**63 FLRA No. 137**

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
REGION 2  
NEW YORK, NEW YORK  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 3911  
(Union)

0-AR-4160

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DECISION

June 22, 2009

Before the Authority: Carol Waller Pope, Chairman and  
Thomas M. Beck, Member

**I. Statement of the Case**

This matter is before the Authority on exceptions to an award of Arbitrator Joseph M. Pastore filed by the Agency and the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. Both parties filed oppositions to each other's exceptions.

The Arbitrator concluded that the Agency did not violate the parties' master collective bargaining agreement (parties' agreement) by sending an e-mail to the Union President that addressed an internal Union matter. However, the Arbitrator further found that the Agency violated the parties' agreement by failing to meet and confer with the Union prior to sending the e-mail. The Arbitrator did not provide a remedy for the violation.

For the following reasons, we conclude that the portion of the award finding that the Agency violated the parties' agreement by failing to meet and confer with the Union prior to sending the e-mail is deficient because the Arbitrator exceeded his authority, and set aside that portion of the award.

**II. Background and Arbitrator's Award**

In July 2005, the Agency learned of the Union's proposed plan (Union's plan) to supplement the salaries of Union representatives on official time. Award at 3.

On December 3, 2005, the Agency Deputy Ethics official sent an e-mail to the Union president, as follows, in pertinent part:

It has come to the Region's attention that the membership of Local 3911 may be contemplating paying "incentive bonuses" to its officers for their work in appearing in a representative capacity in arbitration hearings. As your Deputy Ethics Official, I am writing to inform you that if this compensation is received by any EPA employee, such receipt potentially violates applicable ethics law and regulation.

For example, 18 U.S.C. § 209 generally bars federal employees from receiving supplementation of their salaries from any other sources, including the Union, for services performed as part of their official duties. As the attached Office of Government Ethics (OGE) opinion indicates, union activities constitute "official duties" for purposes of this statute. This statute . . . is part of the Federal criminal code. The Region has discussed the matter with the Office of General Counsel's Ethics Office, which agrees with the conclusion that receipt of these payments may very well be illegal and . . . may also violate the OGE regulation at 5 C.F.R. § 2635.702 regarding misuse of position for personal gain.

Agency Exceptions, Attachment 3.

The Union filed a grievance over the e-mail. The dispute was then submitted to arbitration, where the parties stipulated the following issue for resolution by the arbitrator: "Did the . . . email . . . breach Articles 3, 5, and/or 8 of the Master Collective Bargaining Agreement . . . and, if so, what shall the remedy be?"<sup>1</sup> Award at 2.

Before the Arbitrator, the Union argued, among other things, that the e-mail violated the parties' agreement by interfering and coercing employees in the exercise of their protected rights. *Id.* at 4-5. The Union also claimed that the Agency's conduct in sending the e-mail constituted an unfair labor practice (ULP). *Id.* at 22. As a remedy, the Union requested that the Arbitrator direct the Agency to rescind the e-mail and post a notice to employees. *Id.* The Agency argued that the e-mail did not violate the parties' agreement because it constituted prospective counseling on ethics matters, and not a threat to the Union. Opposition at 7.

1. The pertinent text of the collective bargaining agreement is set forth in the Appendix.

The Arbitrator found that “[t]he central question” was whether the e-mail “was truly a good faith effort to counsel the Union against a potential breach of law or whether it constituted an effort by the Agency to interfere with the right of the Union to manage its own affairs devoid of Agency restraint.”<sup>2</sup> Award at 6. The Arbitrator determined that the e-mail “may be viewed, *per se*, as reasonable and responsible counsel to the Union” that sought “to assist the Union in the avoidance of potential infractions.” *Id.* at 7. In this regard, the Arbitrator found that “there is nothing in the [e-mail] which reaches to accusatory language or threatens adverse action by the Agency[.]” *Id.* at 6. The Arbitrator added that the email “did not restrict the Union from obtaining independent counsel and proceeding with the plan on the basis of such advice.” *Id.*

Based on the foregoing, the Arbitrator found that “there [was] little evidence to conclude” that the Agency violated the “referenced provisions” of the parties’ agreement “with respect to interfering with, restraining, threatening, or otherwise impeding the Union’s right to exist and to manage its affairs.” *Id.* at 7. Therefore, the Arbitrator concluded that the e-mail to the Union President did not violate Articles 3, 5 and 8 of the parties’ agreement. *Id.* at 14. For the same reasons, the Arbitrator also concluded that the Agency’s action in sending the e-mail did not constitute a ULP. *Id.* at 12-13.

Nevertheless, the Arbitrator found that the Agency violated Article 5, Section 2 and Article 7, Sections 1-3 of the parties’ agreement by failing “to meet and confer” with the Union prior to sending the e-mail. *Id.* at 14. The Arbitrator acknowledged that those contractual provisions were not raised in the grievance procedure by the parties:

The Arbitrator is fully aware that the Union’s grievance did not reach to a claim that the Agency violated the MCBA beyond Articles 3, 5, and 8, however, it is clearly established that arbitrators may consider, on a reasonable and relevant basis, all evidence entered by the parties. The parties, in this case, offered the MCBA as a joint exhibit without restrictions on the Arbitrator’s reliance on the terms and conditions of such contract between the parties. Article 7 speaks to the matter of labor-management relations and is, in part, at the core of the issue in this case.

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2. The Arbitrator found, and there is no dispute, that the “legitimacy” of the Union’s plan is not in dispute.

*Id.* at 11 n.6. The Arbitrator did not order a remedy. *Id.* at 14.

### III. Positions of the Parties

#### A. Union’s Exceptions

The Union contends that the award is contrary to § 7116(a)(1) of the Statute because the record evidence shows that the disputed e-mail coerced employees in the exercise of their protected rights. Union’s Exceptions at 21-22. The Union claims that record testimony shows that, after receiving the e-mail, Union officials believed that the implementation of the internal plan would subject the Union to criminal prosecution. *Id.* at 21-22. The Union also claims that the award is contrary to § 7102 because the e-mail interfered with employee rights to act for the Union as a representative.<sup>3</sup> *Id.* at 7-8. The Union requests a remedy that directs the Agency to post a “traditional” notice to employees regarding the Agency’s violation of the Statute. *Id.* at 22.

#### B. Agency’s Opposition

The Agency contends that, as the Arbitrator properly addressed the issues before him, the award is consistent with § 7116(a)(1) of the Statute. Opposition at 2.

#### C. Agency’s Exceptions

The Agency contends that the award is deficient because the Arbitrator exceeded his authority, the award fails to draw its essence from the parties’ agreement, and the award is contrary to law. In particular, the Agency contends that the Arbitrator exceeded his authority because after he resolved the issue before him, he then went on to resolve issues not presented to arbitration. Agency’s Exceptions at 5-6. The Agency further maintains that the award fails to draw its essence from the agreement because the Arbitrator addressed “new” issues that were not before him. *Id.* at 28. The Agency contends that the award is contrary to § 7116(a)(1) of the Statute because it requires the Agency “to meet and confer and initiate collaboration over the Union’s conduct in internal union business.” *Id.* at 6.

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3. Section 7102 of the Statute provides in pertinent part, that:

Each employee shall have the right to . . . assist any labor organization, . . . freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right[.] . . . includ[ing] the right . . . to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other . . . appropriate authorities[.]

#### D. Union's Opposition

The Union contends that it was within the Arbitrator's authority to address Article 5, Section 2 and Article 7, Sections 1-3 of the parties' agreement, and that the Agency has not demonstrated that the award fails to draw its essence from the parties' agreement. Union's Opposition at 5-7, 7-8. The Union also contends that the award is not contrary to § 7116(a)(1) of the Statute. *Id.* at 2.

#### IV. Analysis and Conclusions

##### A. The award is not contrary to § 7116(a)(1) of the Statute.

When an exception to an arbitration award challenges an award's consistency with law, the Authority reviews the question of law raised by the exception and the award *de novo*. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In a grievance proceeding that alleges a ULP under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *NTEU*, 61 FLRA 729, 732 ((2006). Consequently, in resolving the grievance, the arbitrator must apply the same standards and burdens that are applied by ALJs under § 7118 of the Statute. *Id.* In a grievance that alleges a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *Nat'l Labor Relations Bd.*, 61 FLRA 197, 199 (2005) (*NLRB*). As in other arbitration cases, in determining whether the award is contrary to the Statute, the Authority defers to the arbitrator's findings of fact. *Id.*

The Authority has held that the standard for determining whether a statement or conduct violates § 7116(a)(1) of the Statute is an objective one. *United States DOJ, Fed. Bureau of Prisons, Fed. Correctional Inst., Florence, Colo.*, 59 FLRA 165, 191 (2003). The question is whether, viewed objectively, the agency's action would tend to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Statute. *Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 53 FLRA 1500, 1508-11 (1998). Section 7102 guarantees employees the right to engage in activities on behalf of a union, including the right to act for a union in the capacity of a representative. 5 U.S.C. § 7102.

The Arbitrator determined that the disputed e-mail "may be viewed, *per se*, as reasonable and responsible

counsel to the Union" that sought "to assist the Union in the avoidance of potential infractions." Award at 7. In this regard, the Arbitrator found that "there is nothing in the [e-mail] which reaches to accusatory language or threatens adverse action by the Agency." *Id.* at 6. The Arbitrator added that the Agency's action "did not restrict the Union from obtaining independent counsel and proceeding with the plan on the basis of such advice." *Id.* On this basis, the Arbitrator found that "there [was] little evidence to conclude" that the Agency violated the "referenced provisions" of the parties' agreement "with respect to interfering with, restraining, threatening, or otherwise impeding the Union's right to exist and to manage its affairs." *Id.* at 7. Accordingly, the Arbitrator concluded that the disputed e-mail to the Union President did not constitute a ULP. *Id.* at 12-13.

The Union claims that record testimony shows that, after receiving the e-mail, Union officials believed that the implementation of the internal plan would subject the Union to criminal prosecution. Union's Exceptions at 21-22. However, the Union does not challenge any particular arbitral findings as nonfacts and does not claim that the Arbitrator applied an incorrect standard. Moreover, the Union cites no Authority precedent with which the award is inconsistent. In these circumstances, we conclude that the award is not contrary to § 7116(a)(1). See *NTEU, Chapter 90*, 58 FLRA at 393 (deferring to the arbitrator's factual findings, the Authority denied the exception to the arbitrator's conclusion of whether the agency violated § 7116(a)). For the same reasons, we also conclude that the award is not contrary to § 7102.

Consistent with the foregoing, we find that the disputed e-mail did not violate the Statute.<sup>4</sup> Accordingly, we deny the Union's exception.

##### B. The Arbitrator exceeded his authority.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulation of issues the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *United States Info.*

4. We note that the provision of advice by ethics officials is addressed by 5 C.F.R. § 2635.107.

*Agency, Voice of Am.*, 55 FLRA 197, 198 (1999). However, the Authority has held that if an arbitrator decides the merits of a stipulated issue by finding no violation of law or contract, then the arbitrator has no authority to decide an issue not submitted to arbitration. *United States DOL*, 62 FLRA 153, 156 (2007) (*DOL*), *United States Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 53 FLRA 1445, 1449 (1998) (Member Wasserman dissenting) (*Puget Sound Naval Yard*), citing to *Veterans Admin.*, 24 FLRA 447, 451 (1986). Thus, the Authority has found that an arbitrator exceeded his authority when he concluded that an agency did not violate the parties' agreement as alleged, but, nevertheless, resolved an issue not submitted to arbitration. *Puget Sound Naval Yard*, 53 FLRA at 1449.

Applying the foregoing Authority precedent, we find that the Arbitrator exceeded his authority. As noted, the parties stipulated that the issue before the Arbitrator was whether the disputed e-mail violated "Articles 3, 5, and/or 8 of the [parties agreement] and, if so, what shall the remedy be?" Award at 2. The Arbitrator resolved the stipulated issue and found: "there is little evidence to conclude" that the Agency violated the "referenced provisions" of the parties' agreement "with respect to interfering with, restraining, threatening, or otherwise impeding the Union's right to exist and to manage its affairs." *Id.* at 7. Thus, the Arbitrator resolved the merits of the stipulated issue. *Puget Sound Naval Yard*, 53 FLRA at 1449. However, notwithstanding the Arbitrator's conclusion that the Agency did not violate the parties' agreement or law, the Arbitrator went on to find that the Agency violated Article 5, Section 2 and Article 7, Sections 1-3 of the parties' agreement by failing "to meet and confer" with Union prior to sending the disputed e-mail. *Id.* at 14.

The Union argues that it was within the Arbitrator's authority to address Article 5, Section 2 and Article 7, Sections 1-3. Union's Opposition at 5-7. Contrary to the Union's argument, however, the Arbitrator clearly and unambiguously resolved the merits of the stipulated issue and concluded on the merits that the facts did not establish a violation the parties' agreement as set forth in the stipulated issues. *Id.* at 14, 12-13. Once he made that determination, Authority precedent demonstrates that the Arbitrator had no further authority. *Puget Sound Naval Yard*, 53 FLRA at 1449. Accordingly, consistent with Authority precedent, we find that the Arbitrator exceeded his authority when he found that the Agency violated Article 5, Section 2 and Article 7, Sections 1-3 of the parties' agreement. *DOL*, 62 FLRA at 156. (arbitrator exceeded his authority

when he resolved an issue not submitted to arbitration). Therefore, we set that portion of the award aside.<sup>5</sup>

## V. Decision

The portion of the award finding that Agency violated Article 5, Section 2 and Article 7, Sections 1-3 of the parties' agreement is set aside. The Union's exception is denied.

## APPENDIX

### ARTICLE 3

#### GOVERNING LAWS AND REGULATIONS

Section 1. In the administration of all matters covered by this Agreement, the Union, Agency officials and Employees shall be governed by applicable Federal Statutes, as well as, published Agency and Government-wide regulations in existence at the time this Agreement was approved.

### ARTICLE 5

#### UNION RIGHTS AND DUTIES.

Section 1. Employees shall be protected from restraint, interference, coercion or discrimination in the legitimate exercise of their rights and responsibilities as designated representatives of the Union. Within the confines of laws, rules and this Agreement, the Union has the right to designate representatives of its own choosing.

Section 2. The parties agree to strive to improve communications between Employees and the Employer; to promote and improve Agency efficiency; and to improve the morale of the Employees.

### ARTICLE 7

#### LABOR-MANAGEMENT RELATIONS

Section 1. The parties agree to approach dealings with each other in an atmosphere of mutual respect and cooperation. Nothing in this agreement is intended to prevent or discourage the parties from communicating with each other through their duly appointed representatives at all levels. To the contrary, the parties expressly encourage a continuing dialogue by their representatives in the belief that communication prevents and resolves difficulties which may arise.

Section 2. Local levels may establish labor relations committees or provisions for periodic meeting between

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5. In light of this determination, we do not address the Agency's remaining exceptions.

the parties. The procedures and processes for such activities are a matter for local level agreement.

Section 3. At the National and Local levels, the designated representatives will maintain open lines of communication in the day-to-day activities involving the parties' relationship. Where the parties believe face-to-face meetings would be appropriate, they may meet to discuss issues of mutual concern. The mechanics and procedures for such meetings will be decided by the representatives based on the circumstances at the time.

## ARTICLE 8

### EMPLOYEE RIGHTS

#### Section 1.

A. Each employee has the right, freely and without fear of penalty or reprisal, to form, join, and assist labor organizations or to refrain from any such activity, and each employee shall be protected in the exercise of this right.