

63 FLRA No. 162

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
SSA GENERAL COMMITTEE
(Union)

and

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND
(Agency)

0-AR-4204

DECISION

July 31, 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 an exception to an award of Arbitrator Laurence M. Evans filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.

The Union filed a grievance challenging the Agency's decision not to implement Articles 17, 21, 22 and 26 (performance articles) after the Agency head approved the 2005 National Agreement (Agreement). The Arbitrator found that the Agency did not violate the Agreement, or the Statute and denied the grievance. For the reasons that follow, we deny the Union's exception.

II. Background and Arbitrator's Award

On August 12, 2005, the Agency informed the Union that the Agency head had approved the 2005 Agreement and that most of the articles in the Agreement would be effective on August 15, 2005. Award at 2. However, the Agency explained to the Union that the implementation of the performance articles (the articles that cover monetary awards, performance, with-in grade increases and merit promotion) in the Agreement would be delayed because the Agency needed additional time to develop instructions and training "to properly effectu-

ate these agreed-upon procedures[.]" *Id.* The Agency further stated that, until the performance articles in the 2005 Agreement were implemented, "the provisions of the expired . . . [a]greement that apply to awards, performance, within-grade increases and merit promotions [would] remain in effect." *Id.* On September 16, 2005, the Union filed a grievance challenging the Agency's decision not to implement the approved Agreement in its entirety. *See id.* The Union claimed that the delayed implementation of the performance articles violated Articles 1, 3, 4, and 7, among others, of the Agreement, as well as

§ 7116(a)(1)(5) and (8) of the Statute. *See id.* at 2-3. As a remedy, the Union requested that the 2005 Agreement not be implemented until it could be implemented in its entirety, that implementation be done by mutual consent, and that the Union be afforded "other appropriate relief." *Id.* at 3. When the grievance was not resolved, it was submitted to arbitration. Thereafter, the Agency notified the Union that, effective March 13, 2006, it would implement Article 26 of the Agreement. On March 3, 2006, the Agency informed the Union that effective October 1, 2006, the remaining articles would be implemented. As of November 13, 2006, the date of the arbitration hearing, all the performance articles were in effect.

The Arbitrator framed the issue as follows: "Did [the Social Security Administration] violate Articles 1, 3, 4 and 7 of the . . . 2005 [Agreement] and/or Section 7116(a)(1)(5) and (8) of the Statute? If so, what is the appropriate remedy?" *Id.* at 7. At the outset, the Arbitrator noted that under other circumstances the Agency's action "would constitute an egregious violation of the Statute" in addition to violations of "various provisions of its 2005 [Agreement]." *Id.* However, the Arbitrator concluded that "*in the particular and unique facts and circumstances present in this dispute*" the Agency did not violate the Agreement or the Statute. *Id.* at 7-8 (emphasis in original).

The Arbitrator found that the evidence was insufficient to establish that the parties reached a bilateral oral agreement on the implementation of the performance articles during negotiations.¹ *See id.* at 8. However, the Arbitrator found that "the evidence clearly show[ed] that top SSA negotiating officials repeatedly throughout negotiations apprised top level Union negotiators that

1. The Arbitrator noted that the Agency claimed, without support, that it could not enter into a bilateral agreement on delaying the implementation of the performance articles based on the opinion of an Agency attorney who advised that "such a sidebar agreement might not survive agency head review as an infringement on management's rights." Award at 6 n.5.

the implementation of the performance articles would almost certainly be delayed and [that] it appear[ed] that the Union had no problem with that, until August 12, 2005.” *Id.* The Arbitrator found that, as such, the Union had adequate advance notice and ample opportunity to negotiate over the delayed implementation of the performance articles and that the Union “chose acquiescence instead of action.” *Id.* Accordingly, the Arbitrator concluded that the Agency did not fail to fulfill its contractual obligation to provide the Union notice and opportunity to negotiate and that it “did not unlawfully unilaterally delay implementing the agreed-upon performance articles.” *Id.*

The Arbitrator further found that, given the magnitude of the changes, the Union “had to know” that the Agency would be unable to implement the performance articles on time. *Id.* at 8. In this regard, the Arbitrator noted that in contract law terms “this was an instance akin to ‘impossibility of performance.’”² *Id.* at 9. The Arbitrator reiterated his finding that the Union “chose acquiescence over negotiation[s] at all relevant times.” *Id.* Accordingly, the Arbitrator concluded that although the Agency could have handled this matter in a more “inclusive manner[,] . . . it did not fail to fulfill its legal/contractual obligations [to provide] the Union notice and an opportunity to negotiate” regarding the delayed implementation of the “agreed-upon” performance articles of the 2005 Agreement. *Id.* The Arbitrator concluded that the Agency did not violate the Agreement or the Statute and denied the grievance.

III. Positions of the parties

A. Union’s Exception

The Union asserts that the award is contrary to law because the Agency violated

§ 7116 (a)(5) and (8) when it unilaterally decided not to implement the performance articles. The Union asserts that Articles 17, 21, 22 and 26 concern working

2. The doctrine of impossibility of performance in the common law of contracts excuses performance “when it would be unreasonably costly (and sometimes downright impossible)” for a party to carry out its contractual obligations. *Wis. Elec. Power Co. v. Union Pac. R.R. Co.*, 557 F.3d 504, 505 (7th Cir. Wis. 2009).

If the doctrine is successfully invoked, the contract is rescinded without liability. The standard explanation for the doctrine is that nonperformance is not a breach if it is caused by a circumstance the nonoccurrence of which was a basic assumption on which the contract was made. *See id.*

conditions, and that it is illegal for an agency to act unilaterally on matters affecting working conditions. Exception at 6-7. The Union argues that failure to make a change to which the parties have agreed constitutes an illegal unilateral action. *See id.* at 6-7. The Union further argues that the Agency’s illegal conduct is not justified by an alleged “impossibility of performance.” *Id.*

at 7. In this connection, the Union claims that the Arbitrator failed to understand that the issue was not whether a change in working conditions could be implemented, but rather whether the effective date of the change should be decided unilaterally or bilaterally. *See id.* at 7-8. Finally, the Union claims that “acquiescence in the face of a refusal to bargain does not constitute agreement.” *Id.* at 8. In this connection, the Union asserts that the Arbitrator “correctly found” that when the Union attempted to negotiate a change in the effective date of Article 17, the Agency refused to enter into “a bilateral agreement” on the implementation of the performance articles. *Id.* at 9 (citing Award at 6 n.5).³ The Union further contends that the Arbitrator’s finding that the Union attempted to negotiate a sidebar agreement contravenes his conclusion that the Union chose to acquiesce, rather than to bargain. *See id.*

B. Agency’s Opposition

The Agency argues that it did not fail to bargain in good faith over the effective date of the performance articles. The Agency asserts that the issue concerning the delayed implementation of the performance articles was “extensively discussed at the bargaining table” and that the Union “acquiesced to the delayed implementation” *See* Opposition at 4. As such, the Agency requests that the Union’s exception be denied.

The Agency further contends that the Union is incorrect in asserting that the Arbitrator could not find both that the Agency argued that the sidebar agreement may not survive agency head review and that the Union acquiesced to the delayed implementation of the performance articles. In this connection, the Agency asserts that the Union “had every right and opportunity” to question the opinion of Agency negotiators. *See id.* at 6. The Agency asserts that at the time the Agency negotiator objected to the sidebar agreement, the Union could have filed an unfair labor practice (ULP). The Agency

3. *See* n.1 *supra*.

argues that confronted with such a situation a union “cannot shrug its shoulders at the table (or acquiesce to the Agency’s wishes), and then, after reaching a final agreement, argue that the Agency failed to bargain in good faith.” *Id.* According to the Agency, “that is precisely what the Union . . . attempted to do in this case.” *Id.* The Agency asserts that the Union’s acquiescence at the table to the delayed implementation of the performance articles is a question of fact, and that as such, under Authority precedent, the Arbitrator’s determination in this regard should be afforded deference. *See id.* at 7. The Agency further argues that the Union misinterprets the Arbitrator’s statement concerning impossibility of performance.

IV. Analysis and Conclusions

The Union asserts that the award is contrary to law because the Agency violated § 7116 (a)(5) and (8) when it unilaterally decided not to implement the performance articles. We disagree.

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*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of *de novo* review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings. *See id.*

In this case, the Arbitrator found that top SSA negotiating officials repeatedly apprised top level Union negotiators during the negotiations that the implementation of the performance articles would be delayed and that it appeared that the Union did not object until August 12, 2005. *See Award* at 8. As such, the Arbitrator found that the Union had adequate advance notice and ample opportunity to negotiate over the delayed implementation of the performance articles, and that the Union “chose acquiescence over negotiation[s] at all relevant times[.]” *Id.* at 9. Based on these findings, the Arbitrator concluded that the Agency did not violate the Statute and denied the grievance.

Although the Union claims that the Agency unilaterally implemented a change requiring bargaining, it does not claim that, as a matter of law, it could not acquiesce rather than negotiate. Moreover, the Union has not filed an exception challenging the Arbitrator’s factual findings that it chose to acquiesce in the change.

As noted above, in applying a standard of *de novo* review, the Authority defers to the Arbitrator’s factual findings. *See NFFE, Local 1437*, 53 FLRA at 1710. Consistent with the Arbitrator’s findings -- that the Union had adequate advance notice and ample opportunity to negotiate, and that the Union chose acquiescence over negotiations at all relevant times -- we have no basis on which to conclude that the Agency violated § 7116 (a)(5) and (8) of the Statute. *See NTEU*, 63 FLRA 70, 72-73 (2009) (where the Authority denied the union’s contrary to law exceptions based on factual findings not challenged by the union).

In addition, the Union’s argument that the Arbitrator erred by applying the contractual doctrine of impossibility of performance is without merit. The Arbitrator’s comment in this regard was not based on the application of the doctrine, but was a mere statement in which he compared the situation here to that of impossibility of performance. The Arbitrator’s conclusion -- that the Agency did not violate the Agreement or the Statute -- was based on the Union’s acquiescence during the negotiation process, and not on the application of the doctrine of impossibility of performance to the Agency’s inability to implement the performance articles. *See United States Dep’t of the Army, Lettorkenny Army Depot, Chambersburg, Pa.*, 60 FLRA 456, 457 (2004).

Accordingly, as the Union has not demonstrated that the Arbitrator’s award is deficient, we deny the Union’s exception.

V. Decision

The Union’s exception is denied.