64 FLRA No. 42

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

0-AR-4293

DECISION

November 30, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Joshua M. Javits 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 exception.

The Arbitrator dismissed a grievance alleging that the Agency violated the parties' collective bargaining agreement and § 7116(a)(1) and (5) of the Statute when it reclassified certain groups of employees without first giving specific notice to and bargaining with the Union over the impact and implementation of the reclassifications. [1]

II. Background and Arbitrator's Award

The Agency determined to reclassify certain positions on the basis that the position descriptions and job elements for the positions did not accurately reflect the work that employees in those positions performed. Award at 4. The Agency sent the Union an informational notice regarding the reclassifications, in which the Agency stated that the duties, grades, and career ladders of the affected employees would not change, and that, consequently, bargaining with the Union was not required. *Id.*

The Union filed a grievance alleging that the Agency failed to give a formal bargaining notice to, and bargain with, the Union over the reclassifications and, therefore, violated Article 47 of the parties' National Agreement [2] and § 7116(a)(1) and (5) of the Statute. *Id.* at 4. When the grievance was not resolved, it was submitted to arbitration, where the issue stipulated to by the parties, and then clarified by the Arbitrator at the Union's suggestion in its post-hearing brief, was as follows:

> Did the Agency violate Article 47, Sections 1 or 2 of the 2006 National Agreement or 5 U.S.C. Section 7116(a)(1) and/or (a)(5) when, in or about May 2006, it converted [certain categories of employees to different job classifications] without first negotiating with the Union? If so, what shall be the appropriate remedy?

Id. at 2.

At the hearing, the Union's representative testified that the reclassifications constituted a change in working conditions and that, therefore, the Agency was required to provide notice to and bargain with the Union over the impact and implementation of the reclassifications. *Id.* at 7. In this regard, the representative testified that some of the reclassified employees were transferred from awards pools for their previous job series to awards pools for their new job series, which required them to compete for awards with new groups of employees, and that this would have a "domino effect" on all other awards pools. *Id.* at 7-8. In addition, the

1. Under § 7116(a)(1) of the Statute, it is an unfair labor practice (ULP) for an agency "to interfere with, restrain, or coerce any employee in the exercise" of rights under the Statute; under § 7116(a)(5), it is a ULP "to refuse to consult or negotiate in good faith with a labor organization" as required by the Statute.

2. Article 47, Section 1 of the National Agreement provides, in relevant part:

> P. Notice of proposed changes in conditions of employment by the employer . . . will be served on the Union . . . .
>
> S1. Unless otherwise permitted by law, no changes will be implemented by the Employer until proper and timely notice has been provided to the Union, and all negotiations have been completed included any impasse proceedings.

Id. at 5-6. Article 47, Section 2 of the National Agreement provides, in relevant part:

> Where either party proposes changes in conditions of employment that are [Agency]-wide in nature . . . it will consolidate those proposed changes and serve notice thereof on a quarterly basis.

Id. at 6.

Union contended that the reclassifications affected the hardship and job-swap rights of the reclassified employees. [3] *Id*. at 13.

The Agency witnesses testified that the reclassifications merely reflected the affected employees' existing duties and the skills required for those positions, and did not change their duties. *Id*. at 9-11. In addition, an Agency human resource manager testified that the reclassification did not affect awards. *Id*. at 12.

The Arbitrator found that the grievance "center[ed] on" the reclassification of positions, which he found did not constitute a condition of employment and was outside the duty to bargain under § 7103(a)(14)(B) of the Statute. [4] *Id*. at 23. The Arbitrator also noted that grievances regarding a classification action that does not result in the reduction in grade or pay of an employee is not arbitrable under § 7121(c)(5) of the Statute. [5] The Arbitrator made no findings regarding the Union's claims that the reclassifications affected award pools as well as hardship and swap rights. However, the Arbitrator found the Agency's testimony that the reclassifications did not change duties, grade level or pay to be "credible" and presented "without rebuttal." *Id*. Based on the foregoing, the Arbitrator dismissed the grievance. *Id*. at 24.

III. Positions of the Parties

A. Union's Exception

The Union contends that the Arbitrator committed legal error when he ruled that the grievance centered on the reclassification of positions within the meaning of § 7103(a)(14)(B) of the Statute and, therefore, did not concern a condition of employment. Exception at 2. According to the Union, the dispute concerns "the negotiable impact of a classification action." *Id*. at 5. Citing the Authority's decisions in *March Air Force Base, Riverside, Cal*, 13 FLRA 255 (1983) (*March AFB*); *DHHS, SSA, Dallas Region*, 23 FLRA 396 (1986) (*DHHS*); and *Dep't of Transportation, Federal Aviation Admin*, 19 FLRA 472 (1985) (*DOT*), the Union argues that the Agency was required to bargain over the impact and implementation of reclassifications. *Id*. at 6-8. The Union also argues that the Arbitrator erred by finding that the reclassified employees were not required to perform new duties and by failing to consider the Union's arguments and evidence that the reclassifications altered awards pools and affected employees' hardship and job-swap rights. *Id.* at 9-10.

B. Agency's Opposition

The Agency contends that the *March AFB* and *DHHS* decisions are not controlling because, unlike the reclassified employees here, the affected employees in those cases were downgraded and lost pay as a result of reclassification. Opposition at 3 and 6. Likewise, the Agency contends, the *DOT* decision is not controlling because, unlike this case, it involved a reorganization that changed job duties and resulted in relocations, retirements, downgrades, reassignments, and promotions. *Id*. at 6. The Agency argues that under controlling Authority case law, such as *NTEU, Chapter 82*, 59 FLRA 627 (2004), matters integrally related to classification issues are not within the duty to bargain. *Id.* at 5-7. In addition, the Agency contends that the Authority should defer to the Arbitrator's factual finding that the reclassified employees were not required to perform new duties. *Id*. at 3. Finally, the Agency contends that, if the Authority finds merit in the Union's exception, then this case should be remanded to the Arbitrator because he made no factual findings as to whether the effects of the reclassifications were *de minimis*. *Id*. at 8.

IV. Analysis and Conclusions

As the Union's exception challenges the award's consistency with law, the Authority reviews the question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying this standard, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The obligation to engage in "collective bargaining" requires parties to bargain "with respect to the conditions of employment" of employees. 5 U.S.C.

---

3. The term "hardship rights" refers to a requirement in the parties' agreement that, absent just cause, an employer will change the work assignment of an employee demonstrating a significant hardship that can be relieved by reassignment so long as the employee is not reassigned to a different job series. *See* Union's Post-Hearing Brief at 25-26. The term "job-swap" refers to the rights of employees to switch into one another's jobs, and these rights are available only to pairs of employees in the same job series. *Id*. at 25-26.

4. Section 7103(a)(14)(B) provides, in relevant part, that "conditions of employment" do not include policies, practices, and matters "relating to the classification of any position[.]"

5. Section 7121(c)(5) provides, in relevant part, that the grievance procedure shall not apply with respect to any grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee."

§ 7103(a)(12). With limited exceptions not relevant here, "parties must satisfy their mutual obligation to bargain before changes in conditions of employment are implemented." *NTEU, Chapter 143*, 60 FLRA 922, 927 (2005). Even where the substance of an agency's proposed change is not subject to bargaining, an agency must negotiate over the impact and implementation of the change if the effect of the change is greater than *de minimis*. *See U.S. Dep't of Homeland Sec., Customs & Border Prot., Wash., D.C.*, 63 FLRA 434, 437 (2009).

Section 7103(a)(14)(B) of the Statute excludes policies, practices, and matters relating to the classification of any position from the definition of conditions of employment and, by extension, the duty to bargain. In construing that section, the Authority relies on the definition of the term "classification" that appears in 5 C.F.R. § 511.101. *See, e.g.*, *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 49*, 52 FLRA 665, 667 (1996). In this regard, classification entails the identification of the appropriate title, series, grade, and pay system of a position. *See* 5 C.F.R. § 511.701(a) (defining "agency classification actions" as the determination to establish or change the title, series, grade or pay system of a position).

Consistent with the foregoing, "not all matters related to classification are excluded from the scope of bargaining." *March AFB*, 13 FLRA at 258. In particular, the Authority has held that such matters as changes in position descriptions and the timing of reclassifications are bargainable. *Id*. at 259-60. *See also DHHS*, 23 FLRA at 400 (same); *DOT*, 19 FLRA at 476 and n.3 (agency required to bargain over procedures and arrangements for employees resulting from a reclassification that had more than a *de minimis* impact). Although the Agency attempts to distinguish those decisions on the ground that they involved downgrades, nothing in the decisions indicates that an agency is required to bargain over the impact and implementation of reclassifications only when they result in downgrades. In fact, in *DOT*, the Authority found a duty to bargain where some of the reclassifications actually resulted in promotions. *See* 19 FLRA at 475 (while some employees were downgraded, "approximately seven employees were promoted[]"). Thus, the fact that no employees were downgraded in the instant case does not demonstrate that the Agency lacked a duty to bargain over the impact and implementation of the reclassifications.

Here, there is no contention that the Union either grieved or sought to bargain over the title, series, grade, and/or pay systems of affected employees. Instead, as stipulated by the parties, the issue before the parties was whether the Agency improperly implemented the reclassification without bargaining with the Union. As the Arbitrator acknowledged, the Union asserted that bargaining over the "effects" of the reclassification was required because the change resulted in changes in matters such as award pools that were more than *de minimis*. Award at 14. Accordingly, we find that, insofar as the Arbitrator found that the grievance does not concern a condition of employment, the award is contrary to § 7103(a)(14)(B) of the Statute.

However, we are unable to determine from the record before us whether, applying precedent properly, the Agency violated the Statute or the parties' agreement. In this regard, the Arbitrator found that there was no change in employees' grade levels, pay, or duties. [6] *See* Award at 23. However, he did not resolve the dispute about award pools, hardship rights and job-swap rights, and he did not address whether such effects, if found, are *de minimis*. Moreover, the record does not permit the Authority to resolve the dispute over these alleged affects or to determine whether they are greater than *de minimis*, such that the Agency would have a duty to bargain over the impact and implementation of the reclassifications. We note, in this regard, that § 7121(c)(5), on which the Arbitrator appears to rely in part, does not apply here. That section excludes from the scope of grievance and arbitration procedures grievances concerning "the classification of any position which does not result in the reduction in grade or pay of an employee[,]" not grievances concerning the duty to bargain over the impact and implementation of reclassifications.

---

6. Although the Union argues that the Arbitrator erred by finding that the reclassifications did not result in the assignment of new duties, the parties disputed this matter before the Arbitrator. To the extent that the Union is alleging that the award is based on a nonfact, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). Therefore, we reject the Union's argument.

In sum, as the Arbitrator failed to address whether the reclassifications had a greater than *de minimis* impact on conditions of employment, thereby giving rise to a bargaining obligation, we remand the case to the parties for resubmission to the Arbitrator, absent settlement, so that he can make this determination.

V. Decision

We remand the case to the parties for resubmission to the Arbitrator, absent settlement, for resolution consistent with its decision. We deny the Union's exception that challenges the Arbitrator's factual finding that the reclassifications did not result in the assignment of new duties.