

64 FLRA No. 44

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS 33
LOCALS 1007 AND 3957
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
OAKDALE, LOUISIANA
(Agency)

0-AR-4213

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 exceptions to an award of Arbitrator Stanley H. Sergent filed by the Union under § 7122 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 exceptions.

The Arbitrator denied a grievance concerning the Agency's alleged refusal to negotiate over the impact and implementation of its plan to increase the number of posts to which it could assign correctional officers. For the reasons discussed below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency notified the Union that it planned to consolidate the correctional services departments of two detention facilities, a Federal Correctional Institute (FCI) and a Federal Detention Center (FDC), at the Oakdale, Louisiana Federal Correctional Complex (FCC). Award at 2-3, 12-13, 16, 26. FCI and FDC had separate "sick and annual" rosters, composed of correctional officers at each facility assigned to posts that are temporarily vacated when other correctional officers take leave. *See id.* at 12, 16-19, 26. Prior to the planned consolidation, correctional officers on the "sick and annual" roster at FCI were assigned only to posts at FCI, and correctional officers on the "sick and annual" roster

at FDC were assigned only to posts at FDC. *See id.* Under the proposed consolidation, the Agency would continue to maintain separate "sick and annual" rosters at FCI and FDC, but would begin assigning correctional officers on the "sick and annual" rosters to posts at both facilities. *See id.*

Shortly after the Agency notified the Union of its plan, an Agency representative met with Union representatives to discuss ground rules for negotiating the impact and implementation of the plan. *See id.* at 18, 26. The Union subsequently submitted more than six proposals, at least five of which the Agency adopted. *Id.* at 26. A Federal mediator conducted a mediation, and subsequently declared an impasse. *Id.* at 26, 28. After waiting a period of time to ensure that the Union did not seek assistance from the Federal Service Impasses Panel (FSIP), the Agency temporarily, and later permanently, implemented the consolidation plan. *See id.* at 6, 18, 26, 28.

The Union then filed a grievance claiming that the Agency failed to negotiate in good faith over the consolidation, in violation of the parties' agreement and the Statute. *See id.* at 5. When the grievance was not resolved, it was submitted to arbitration where, as relevant here, the Arbitrator framed the issue as follows: "Did the Agency violate the rights of the Union under the [parties' agreement] by implementing a plan to consolidate the Correctional Services Department at the Oakdale Complex without affording the Union the opportunity to negotiate the effects and impact of the consolidation?"¹ *Id.* at 8. In this regard, the Arbitrator considered whether the Agency violated Article 3 and Article 7(b), of the parties' agreement.² *See id.* at 24.

1. The Arbitrator also resolved an issue of procedural arbitrability. *Id.* at 20-23. As no exceptions were filed to this aspect of the award, we do not address the matter further.

2. Article 3 states, in pertinent part:

Section c. The Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment, where required by 5 USC 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

Award at 9.

Article 7(b) states:

In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligations imposed on it by the [S]tatute and this Agreement. This includes, in accordance with applicable laws and this Agreement, the obligation to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority in accordance with the Federal Labor Management Statute.

Union Attachment, Master Agreement at 16.

The Arbitrator determined that the Agency fulfilled its obligation to negotiate in good faith over the impact and implementation of the consolidation. *Id.* at 26-27. In this regard, the Arbitrator found that the Agency “notified the Union of the intended change, met . . . with the Union on several occasions, and did attempt to negotiate, as evidenced by the fact that proposals and counter-proposals were exchanged[.]” *Id.* 27-28. The Arbitrator further found that “the fact that the Union requested mediation clearly indicates that the parties were meeting and attempting to achieve an agreement.” *Id.* at 28. The Arbitrator also determined that the Agency demonstrated good faith by “delay[ing] implementation of the consolidation plan” for one month so that the Union would have an opportunity to request the services of the FSIP. *Id.* at 26, 28.

Alternatively, the Arbitrator found that the Agency had no duty to negotiate because the proposed change was: (1) *de minimis*, and (2) covered by the parties’ agreement. *See id.* at 26-27.

Based on the foregoing, the Arbitrator concluded that the Agency did not violate the Statute or the parties’ agreement, and denied the grievance. *Id.* at 28.

III. Positions of the Parties

A. Union’s Exceptions

The Union claims that the award is contrary to law because the Arbitrator erred by finding the Agency fulfilled its obligation to negotiate in good faith. Exceptions at 3-5. According to the Union, the parties “met in a non-negotiating format[.]” and understood that “meetings [would not] be negotiating sessions.” *Id.* at 5 (second alteration in original). Additionally, the Union contends that “concerns raised in a non-negotiating format do not rise to the level of bargaining proposals[.]” *Id.* The Union thus asserts that the parties “weren’t bargaining.” *Id.*

The Union alleges as well that the Agency acted in bad faith. In this connection, the Union claims that the Agency had “determined not to bargain over [the plan] . . . even before it had seen any Union ‘proposals’ addressing Union concerns.” *Id.* at 4. The Union further asserts that the Agency did not “ever modify or change its position on its duty to bargain.” *Id.* at 5. Similarly, the Union argues that the Agency “refused in the beginning to bargain procedures in which the negotiation sessions would take place.” *Id.* Moreover, the

Union claims, the Agency “unilaterally scheduled” the parties’ meetings. *Id.* at 4.

In addition, the Union contends that the Arbitrator erroneously found that the change is covered by the parties’ agreement and that the effect of the change was only *de minimis*. *Id.* at 2-3. Thus, the Union contends that the Agency committed an unfair labor practice (ULP) in violation of 5 U.S.C. § 7116(a)(1), (5), and (8).³ *Id.* at 5.

The Union also alleges that the award violates Article 32 section h. of the parties’ agreement,⁴ and that the Agency violated Articles 3, 4, and 7 of the agreement.

B. Agency’s Opposition

The Agency asserts that the Union “does not provide any specific argument to contradict the Arbitrator’s finding that the Agency and the Union did, in fact, negotiate the consolidation and that the Agency acted in good faith.” *Opp’n* at 4. The Agency also contends that the Arbitrator correctly found that the subject matter of the charge was covered by the parties’ agreement and that the effects of the changes were *de minimis*. *Id.* at 3-4.

3. Section 7116(a) states, in pertinent part that it is an unfair labor practice for an agency:

(1) to interfere with, restrain, or coerce any employee in the exercise . . . of any right under this chapter;

. . . .

(5) to refuse to consult or negotiate in good faith . . . ;

. . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

4. Article 32, Section h. states:

The arbitrator’s award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute.

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or
2. published Federal Bureau of Prisons policies and regulations.

Union Attachment, Management Agreement at 69-70.

IV. Preliminary Issue

With regard to Article 4 of the parties' agreement, we note that there is no indication in the record that the Union argued, before filing its exceptions, that the Agency violated Article 4 of the parties' agreement. Pursuant to § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented in the proceedings before an arbitrator. *U.S. Dep't of Transp., Fed. Aviation Admin.*, 61 FLRA 54, 56 (2005). Accordingly, we decline to consider further the Union's argument regarding Article 4 of the parties' agreement.

V. Analysis and Conclusions

A. The award is not contrary to law.

1. Bad-faith bargaining claim: legal framework

The Union contends that the award is contrary to law because the Arbitrator erred by finding that the Agency negotiated in good faith. 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 *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. See *U.S. Dep't of Def., Dep'ts of the Army & 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.*

When a grievance under § 7121 of the Statute involves an alleged ULP, the arbitrator must apply the same standards and burdens that an administrative law judge would apply in a ULP proceeding under § 7118. *U.S. Dep't of Def., Def. Logistics Agency, Def. Distrib. Depot, New Cumberland, Pa.*, 58 FLRA 750, 756 (2003). In a grievance alleging a ULP by an agency, a union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *Id.* As in other arbitration cases, the Authority defers to the arbitral findings of fact. *Id.*

As noted previously, § 7116(a)(5) of the Statute states that it is a ULP for an agency "to refuse to consult or negotiate in good faith with a labor organization as required by [the Statute.]" As relevant here, the duty of an agency and an exclusive representative to negotiate in good faith encompasses the obligations set forth in § 7114(b)(1) and (3) of the Statute. See, e.g., *NAGE, Local R3-10*, 51 FLRA 1265, 1269 (1996). Under

§ 7114(b)(1) and (3), the duty to negotiate in good faith includes "the obligation . . . to approach the negotiations with a sincere resolve to reach a collective bargaining agreement . . . [and] . . . to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays[.]" See *id.* at 1270. In addition, § 7103(a)(12) of the Statute defines collective bargaining as the "performance of the mutual obligation of the representative of an agency and the exclusive representative of employees . . . to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]" *U.S. Dep't of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Tex.*, 63 FLRA 256, 259 (2009) (Member Beck writing separately as to other matters) (*Randolph Air Force Base*).

In determining whether a party has fulfilled its negotiating responsibility in a particular case, the Authority considers "the totality of the circumstances[.]" *U.S. Dep't of Justice, Executive Office for Immigration Review, N.Y., N.Y.*, 61 FLRA 460, 465 (2006) (*Immigration Review*) (citing *U.S. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 531 (1990) (*Wright-Patterson*)). The Authority has found a failure to negotiate in good faith where, for example, an agency failed to respond to a request to negotiate, failed to set dates for negotiation sessions, failed to attend a negotiation session in full, and submitted proposals that, among other things, would have precluded the union from seeking third-party assistance in resolving impasses. See *Wright-Patterson*, 36 FLRA at 531-34. The Authority also has found a failure to negotiate in good faith where an agency failed for five months to provide specific proposed dates for negotiations, and violated the parties' ground rules. See *Immigration Review*, 61 FLRA at 465-66. Further, the Authority has found a failure to negotiate in good faith where an agency did not submit negotiation proposals to the union. See *Randolph Air Force Base*, 63 FLRA at 261.

By contrast, the Authority has declined to find a failure to negotiate in good faith where there was "no basis on which to conclude that the [a]gency failed to approach bargaining with the requisite resolve to reach an agreement, was not properly represented, refused to meet with the Union, or failed to execute a written agreement, as . . . set forth in" § 7114(b). *NAGE, Local R3-10*, 51 FLRA at 1270.

2. Bad-faith bargaining claim: application of legal framework

As discussed above, the Arbitrator found that the Agency “met or attempted to meet with the Union on several occasions, and did attempt to negotiate, as evidenced by the fact that proposals and counter-proposals were exchanged between the parties and that some of these were agreed upon.” Award at 27-28. In addition, the Arbitrator found that “the parties were meeting and attempting to achieve an agreement.” *Id.* at 28.

The Union does not assert that the award is based on a nonfact. Moreover, the Arbitrator’s factual findings, to which we defer, support the legal conclusion that the parties engaged in collective bargaining because, under § 7103(a)(12), the parties “[met] at reasonable times” and “consult[ed] and bargain[ed] in a good-faith effort to reach agreement with respect to the conditions of employment[.]” Similarly, the Arbitrator’s findings support the legal conclusion that the Agency negotiated in good faith because, under § 7114(b)(1) and (3), the Agency “approach[ed] the negotiations with a sincere resolve to reach a collective bargaining agreement[.]” met at “reasonable times and convenient places[.]” and met “as frequently as may be necessary,” while avoiding “unnecessary delays[.]”

We note the Union’s claim that the Agency “had no intention of bargaining . . . with the Union from the very beginning.” Exceptions at 5. In this regard, the Union asserts that the Agency did not modify its position on its duty to negotiate, refused to negotiate procedures, and unilaterally scheduled meetings between the parties. *Id.* at 4-5. However, the Union does not provide any support for its factual claims, and does not demonstrate that the Arbitrator’s legal conclusion is erroneous.

Based on the foregoing, we find that the award is not contrary to § 7116 of the Statute.

3. Union’s additional contrary to law claims

As noted above, the Union asserts that the Arbitrator also erred by finding that: (1) the subject matter of the change was “covered by” the parties’ agreement, and; (2) the effect of the changes were *de minimis*. With regard to these assertions, the Authority has consistently recognized that when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the award found deficient. *See, e.g., U.S. Dep’t of the Treasury, Internal Revenue Serv., Oxon Hill, Md.*, 56 FLRA 292, 299 (2000). In those circumstances, if the excepting party has not demonstrated that

the award is deficient on one of the grounds relied on by the Arbitrator, then it is unnecessary to address exceptions to the other grounds. *See id.*

Here, the Arbitrator based his finding that the Agency did not commit a ULP on three separate and independent grounds. As we have found that the Arbitrator’s determination with respect to one of these grounds — specifically, his finding that the Agency fulfilled its obligation to negotiate in good faith — is not deficient, the Union’s remaining contrary to law assertions provide no basis for finding the award deficient.

For the foregoing reasons, we deny the Union’s contrary-to-law exceptions.

B. The award does not fail to draw its essence from the parties’ agreement.

The Union claims that the Arbitrator violated Article 32 section h. of the parties’ agreement. Exceptions at 1. Additionally, the Union claims that the Agency violated Articles 3 and 7 of the parties’ agreement. *Id.* at 5. We construe these claims as allegations that the award fails to draw its essence from the parties’ agreement.

In reviewing an arbitrator’s interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep’t of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context “because it is the arbitrator’s construction of the agreement for which the parties have bargained.” *Id.* at 576.

With regard to Article 32, section h. of the parties’ agreement, the Union does not explain how the award fails to draw its essence from the parties’ agreement. As such, we deny this claim as a bare assertion. *See, e.g., AFGE, Local 1858*, 59 FLRA 713, 715 (2004).

With regard to Articles 3 and 7 of the parties' agreement, as noted previously, those provisions require the Agency to negotiate with the Union pursuant to the obligations set forth in the Statute. For the same reasons that we have denied the Union's contrary to law exceptions, we find that the Arbitrator's interpretation of the agreement does not disregard the agreement and is not irrational, unfounded, or implausible. *See, e.g., NATCA*, 51 FLRA 102, 110 (1995). As such, this exception provides no basis for finding the award deficient.

VI. Decision

The exceptions are denied.