64 FLRA No. 95

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
WASHINGTON, D.C.
(Agency)

and

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

0-AR-4225

DECISION

March 5, 2010

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

The grievance alleged that the Agency had a duty to bargain over a change involving correctional services rosters. The Arbitrator concluded that the Agency violated § 7116(a)(1) and (5) of the Statute and the parties' Master Agreement (parties' agreement) by refusing to bargain over the impact and implementation of the change.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

As a cost-savings measure, the Agency announced an "initiative" involving correctional services rosters that eliminates posts the Agency determines not to be critical to carrying out its mission. Award at 2-3. Affected employees would be provided the opportunity "to review and bid on posts[.]" *Id.* at 2. The Agency described this initiative as "Mission Critical Rosters" (critical roster program). *Id.* at 1.

When it became aware of the critical roster program, the Union requested negotiations prior to implementation. *Id.* at 4. The Agency and the Union subsequently met several times to "discuss" the critical roster program. *Id.* at 4-5. Neither party claims that these discussions constituted negotiations. *Id.* at 5 n.3. In an exchange of letters between the parties, the Agency stated it was not obligated to bargain over the critical roster program because that matter was "covered by" the parties' agreement. *Id.* at 5. Subsequently, the Union filed a grievance that claimed the Agency violated § 7116 of the Statute and Articles 3 and 4 of the parties' agreement by refusing to bargain over the impact and implementation of the critical roster program. [1] When the grievance was not resolved, it was submitted to arbitration. The parties agreed to frame the issues as follows:

> (1) Whether the Federal Bureau of Prisons violated 5 U.S.C. [§] 7116 or the collective bargaining agreement by refusing to bargain over the impact and implementation of the mission critical rosters. (2) If so, what is the appropriate remedy?

Id. at 12.

The Agency argued that the critical roster program is "covered by" Article 18(d) of the parties' agreement. [2] It therefore claimed that, because correctional service rosters are covered by Article 18(d)(2), the Union was seeking to renegotiate a subject that was already fully negotiated. *Id.* at 11. For this reason, the Agency posited that it would be inappropriate for the Arbitrator to issue the bargaining order remedy that the Union sought.

1. Article 3 requires, among other things, that the agency bargain over all policies, practices, and procedures that will impact the employees' conditions of employment (at section (c)) as well as over all proposed national policy issuances that affect any personnel policies, practices, or conditions of employment (at section (d)). Article 4, section (c) states that the Employer must negotiate over changes to be implemented to working conditions at the local level. The pertinent text of the relevant articles is set forth in the Appendix.

2. Article 18(d) addresses how "Quarterly rosters for Correctional Services employees" are to be prepared, laying out details such as the composition of a joint roster committee, how employees should submit preference requests and complaints, how far in advance rosters must be posted, and other related procedural requirements regarding rosters. The text of this article is set forth in the Appendix.

The Arbitrator found that the Agency had a duty to bargain over the impact and implementation of its decision to use mission critical rosters. Rejecting the Agency's argument that the critical roster program is covered by Article 18(d) of the parties' agreement, the Arbitrator found that Article 18(d) "deals exclusively" with "procedures to fill correctional officers' posts once management decides what posts it wants to fill" and does not constitute a cost-saving, nationwide change in staffing patterns as the Agency alleged. *Id.* at 12. Because the Arbitrator found that the Agency had a duty to bargain over the impact and implementation of its decision to use mission critical rosters, he concluded that, by refusing to bargain, the Agency violated § 7116(a)(1) and (5) of the Statute, as well as Articles 3(c) and (d), 4, and 7(b) of the parties' agreement.[3] *Id.* at 13-15.

III. Positions of the Parties

1. Agency's Exceptions

The Agency asserts that the award is contrary to law because the Arbitrator incorrectly determined that the mission critical roster program is not covered by Article 18 of the parties' agreement. Exceptions at 3. The Agency does not allege that the critical roster program is expressly contained in the parties' agreement. However, it maintains that Article 18's detailed procedures for scheduling and creating rosters, as well as for employees to request specific shifts, is proof that all issues relating to rosters, including mission critical rosters, are so inseparably bound up with the parties' agreement as to be covered by it. *Id.* at 6-7.

2. Union's Opposition

The Union contends that the Arbitrator correctly determined that the mission critical roster program is not covered by Article 18. Opposition at 5, 8.

IV. Analysis and Conclusion

We deny the Agency's exceptions because we find that the Arbitrator's award is not contrary to law in that it correctly finds that the critical roster program is not covered by Article 18 of the parties' agreement.

When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award *de novo. 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. *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. *Id.*

When a grievance under § 7121 of the Statute involves an alleged unfair labor practice (ULP), the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118. In a grievance alleging a ULP by an agency, the Union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *See AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 909 (1998). However, as in other arbitration cases, including those where violations of law are alleged, the Authority defers to an arbitrator's findings of fact. *See, e.g., U.S. Dep't of Commerce, Patent and Trademark Office*, 52 FLRA 358, 367 (1996).

The "covered by" doctrine is a defense to a claim that an agency failed to provide a union with notice and an opportunity to bargain over changes in conditions of employment. *U.S. Dep't of the Treasury, IRS, Denver, Colo.*, 60 FLRA 572, 573 (2005) (citing *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 53 (2000)). This doctrine excuses parties from bargaining on the ground that they have already bargained and reached agreement concerning the matter at issue. *U.S. Dep't of Health and Human Servs., SSA, Balt., Md.*, 47 FLRA 1004, 1015 (1993). The doctrine has two prongs. Under the first prong, if a party seeks to bargain over a matter that is expressly addressed by the terms of the parties' collective bargaining agreement, then the other party may properly refuse to bargain over the matter. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). The second prong states that, if a matter is not expressly addressed by the terms of the parties' collective bargaining agreement, but is nonetheless inseparably bound up with and, thus, an aspect of a subject covered by the terms of the agreement, then the other party also may properly refuse to bargain over the matter. *Id.* at 813-14.

3. Section 7(b) requires the Agency to adhere to all obligations imposed on it by the parties' agreement and the Statute, including the duty to bargain regarding matters concerning personnel policies, practices, and other conditions of employment. The text of this section is set forth in the Appendix.

In rejecting the Agency's assertion that Article 18 encompasses all aspects of the roster program, including mission critical rosters, the Arbitrator found that the mission critical roster program addresses the impact of a nationwide change in staffing patterns launched to save costs while Article 18 deals with procedures negotiated to address correctional officer vacancies that management wants to fill. Award at 12. The Arbitrator's findings are reasonable and supported by the record. We therefore defer to the Arbitrator's factual findings and conclude that the critical roster program is not covered by Article 18 of the parties' agreement because he correctly identified and applied the Authority's principles.

Moreover, the Agency's argument that the critical roster program is covered by Article 18 is similar to the argument the Authority considered and rejected in *U.S. Dep't of Justice, Fed. Bureau of Prisons*, 63 FLRA 132, 136 (2009) (*BOP*). There, the Authority upheld a different arbitrator's finding that the same critical roster program at issue in the present case dealt with situations where employees' positions were abolished and the employees reassigned. *Id.* The Authority concluded that, "[a]lthough the matter . . . concerns a roster, there is nothing to show that Article 18 addresses critical rosters that involve the elimination of specialized positions . . . ." [4] *Id.* Because the Authority agreed with the Arbitrator that the critical roster program was not expressly addressed by Article 18 or inseparably bound up with the matters contained in that provision, the Authority held that it was not covered by the collective bargaining agreement.

The Arbitrator's findings in the present case are substantially similar to the findings made by the arbitrator in *BOP.* While Article 18 and the critical roster program both deal with rosters, the contract language lays out the procedures for filling specific positions while the roster program addresses the impact on bargaining unit employees of eliminating certain positions. Therefore, it is the Authority's conclusion that the Arbitrator correctly determined that the critical roster program is neither expressly addressed in the terms of the parties' agreement nor inseparably bound up with the type of rosters addressed in Article 18.

Because the critical roster program was not covered by the parties' agreement, the Agency had a duty to bargain over the impact and implementation of this program. As the Arbitrator found, the Agency's failure to do so violated § 7116(a)(1) and (5) of the Statute and the parties' Master Agreement. For this reason, we find that the Arbitrator's award is not deficient as contrary to law and we deny the Agency's exceptions.

Furthermore, we also deny the Agency's exceptions because the Agency did not except to all of the grounds the Arbitrator relied on in rendering his award. The Authority has consistently held that, when an arbitrator bases an award on two or more separate and independent grounds, the appealing party must establish that all of the grounds relied on are deficient in order for the Authority to find the award deficient. *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007); *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000) (*IRS, Oxon Hill, Md.*)

Here, the Arbitrator expressly relied on two separate and independent grounds for his award. He found that, by refusing to bargain, the Agency violated § 7116(a)(1) and (5) of the Statute, as well as Articles 3(c) and (d), 4, and 7(b) the parties' agreement. Award at 16. The Agency's exceptions dispute one of these grounds — the Arbitrator's conclusion that, by refusing to bargain, the Agency violated § 7116(a)(1) and (5) of the Statute — but the exceptions do not explicitly address the Arbitrator's finding that the Agency violated the collective bargaining agreement. Articles 3(c), 4, and 7(b) of the parties' agreement all contain language that specifically references the parties' statutory duties. [5] However, Article 3(d) of the parties' agreement stands on its own as an unrelated bargaining provision that makes no reference to the collective bargaining agreement. [6]

Article 3(d) states that all proposed national policy issuances must be provided to the Union and that if any of the provisions change or affect any personnel policies, practices, or conditions of employment, the Agency must bargain with the Union over the proposed changes prior to issuance and implementation. Exceptions, Attachment E at 5. Because this provision establishes a contractual obligation to bargain and makes no reference to any statutory bargaining obligation, Article 3(d) imposes an independent bargaining obligation. In

4. The Article 18 referenced in the *BOP* case is the same one at issue in the present case.

5. Article 3(c) references the parties' obligation to negotiate over any conditions of employment where required by 5 U.S.C.§§ 7106, 7114, and 7117. Article 4(a) requires the parties to have "due regard" for obligations imposed on it by these statutory sections in prescribing regulations related to conditions of employment. Article 7(b) binds the Agency to adhere to all obligations imposed on it by statute. See the Appendix for complete text.

6. See the Appendix for the complete text of Article 3(d).

his award, the Arbitrator found that, by refusing to bargain with the Union, the Agency violated Article 3(d). Nevertheless, the Agency's exceptions did not address this basis of the Arbitrator's award. Consequently, we find that the Arbitrator's award is based on a separate and independent ground to which the Agency does not except, and we therefore deny the Agency's exceptions for this reason as well. *U.S. Dep't of the Army, Blue Grass Army Depot, Richmond, Ky.*, 58 FLRA 314, 315 (2003).

V. Decision

The Agency's exceptions are denied.

APPENDIX

The relevant text of the parties' agreement is set forth below:

Article 3. **Governing Regulations**

. . . .

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 [U.S.C. §§] 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation . . . .

Section d.

All proposed national policy issuances, including policy manuals and program statements, will be provided to the Union. If the provisions contained in the proposed policy manual and/or program statement change or affect any personnel policies, practices, or conditions of employment, such policy issuances will be subject to negotiation with the Union, prior to issuance and implementation.

Article 4. **Relationship of this Agreement to Bureau Policies, Regulations, and Practices**

Section a.

In prescribing regulations relating to personnel policies and practices and to conditions of employment, the [Agency] and the Union shall have due regard for the obligation imposed by 5 [U.S.C. §§] 7106, 7114, and 7117. . . .

. . . .

Section c.

The [Agency] will provide expeditious notification of the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the . . . Agreement.

. . . .

Article 7 – **Rights of the Union**

. . . .

Section b.

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. . . .

. . . .

Article 18 - **Hours of Work**

. . . .

Section d.

Quarterly rosters for Correctional Services employees will be prepared in accordance with the below-listed procedures.

1. [A] roster committee will be formed which will consist of representative(s) of Management and the Union. . . .

2. [S]even (7) weeks prior to the upcoming quarter, the [Agency] will ensure that a blank roster . . . will be posted . . . for the purpose of giving . . . employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests. . . .

. . . .

7. [T]he completed roster will be posted three (3) weeks prior to the effective date of the quarter change. . . .

8. [T]he Employer will make every reasonable effort, at the time of the quarter change, to ensure that no employee is required to work sixteen (16) consecutive hours against the employee's wishes.

Exceptions, Attachment E.