64 FLRA No. 176

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES
CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4396

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DECISION

June 24, 2010

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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 M. David Vaughn filed by the Agency (or Department of Homeland Security (DHS)) under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union (or NTEU) filed an opposition to the Agency's exceptions.[1]

The Arbitrator concluded that the Agency violated § 7116(a)(1) and (5) of the Statute "and/or applicable past practice or provision of" certain expired collective bargaining agreements when it implemented a policy that it would no longer comply with certain past practices and provisions of those agreements. For the reasons that follow, we conclude that the Arbitrator exceeded his authority by addressing the issue of the Agency's treatment of employees newly hired as customs and border protection officers, but we deny the Agency's remaining exceptions.

1. As discussed further below, the Union also filed a motion to dismiss the exceptions as untimely filed.

II. Background and Arbitrator's Award

Several federal agencies were transferred to DHS pursuant to the Homeland Security Act of 2002 (the Act). The Act established Customs and Border Protection (CBP) as a division of DHS. *E.g., NTEU*, 63 FLRA 28, 28 (2008). As relevant here, CPB was staffed with employees who had worked for other federal agencies and had been represented by various unions, including NTEU. The unions were parties to collective bargaining agreements (legacy agreements) that had been negotiated with the former agencies prior to the Act and creation of CBP, with one exception not relevant here. Award at 5. All of the legacy agreements had expired, also with one possible exception not relevant here. *Id.* at 5-6.

After the creation of CBP, newly hired employees were placed into bargaining units on the basis of their position. Specifically, they were placed in whatever bargaining unit included positions that performed duties that were most closely associated with their duties. However, when the Agency created the new position of customs and border protection officer (CBPO), employees hired into that position (newly hired CBPOs) were treated as "eligible for bargaining unit membership but were unrepresented." *Id.* at 6. By Agency directive, these employees are covered by the agency grievance procedure of the former Customs Service (administrative grievance procedure), rather than any of the negotiated grievance procedures of the expired legacy agreements. *Id.*

As the result of an election, the Authority certified NTEU as the exclusive representative of a newly defined unit of Agency employees, which included employees who had been part of the (now-defunct) units that had transferred to the Agency. After the Union was certified, the Agency's director of labor relations (the director) sent a letter to the Union's national president explaining the Agency's "intent regarding several administrative matters[:]" (1) employee dues allotments; (2) official time; (3) Agency-provided facilities and equipment; and (4) grievances. Exceptions, Attach. 13 (director's letter) at 2-3.

As to dues allotments, the director stated that the Agency would continue to honor allotments to the Union for the unit that it previously represented. As to new allotment requests for the newly certified NTEU unit, he advised that, until specific procedures were negotiated, the new requests would be processed under the procedures of the Statute. At the

same time, he noted that the Agency must also honor employee requests for terminations. *Id.* at 3.

As to official time, he stated that the Agency would permit the Union to use the blocks of official time at the level immediately prior to certification. *Id.* He further advised that the Agency would grant requests for official time, to the extent consistent with operational requirements, for representatives officially designated by the Union to perform traditional representational functions. *Id.*

As to Agency-provided facilities and equipment, the director stated that the Agency would permit, consistent with mission and operational requirements, the Union to occupy facilities and utilize equipment previously provided by the Customs Service. *Id.* However, he emphasized that the Union could not assume or acquire the space and equipment utilized by the other former exclusive representatives.

As to grievances, the director advised that, absent agreement otherwise, the Agency would continue to process employee grievances in accordance with whatever procedures applied to the employees at the time of the certification. He noted that, for newly hired CBPOs, this meant the administrative grievance procedure. *Id.* As to institutional grievances, the director stated that, although not required by the Statute to do so, the Agency would permit the Union to file institutional grievances under the legacy agreement between NTEU and the Customs Service. He also stated that the Agency would permit the Union to invoke arbitration on both employee grievances and institutional grievances. *Id.* at 3-4.

On the same day the director's letter was sent to the Union, the director distributed to all managers and supervisors a memorandum and attachment concerning post-certification responsibilities and obligations (post-certification guidance). Specifically, the post-certification guidance: (1) reiterated the statements from the director's letter; and (2) stated that although the Agency was obligated to continue to recognize established "employee conditions of employment[,]" those conditions were distinguishable from "union institutional benefits[.]" Exceptions, Attach. 14 at 2-3. As to institutional benefits in relation to grievances, the post-certification guidance addressed grievances filed before the Union was certified. The post-certification guidance advised that, as the grievances concerned events prior to the Union's certification, the Union was not entitled to take over these cases by default if they had been filed by a former exclusive representative or an employee in one of the bargaining units represented by a former exclusive representative. *Id.* at 4.

In response to the director's letter and post-certification guidance, and the Agency's denial of certain requests for training and official time, the Union filed two grievances. The parties were unable to resolve the grievances, and they were submitted to arbitration on the following stipulated issue:

> Did the [Agency] violate 5 [U.S.C.] [§] 7116(a)(1) and (5) and/or any applicable past practice or provision of the [legacy agreements] when . . . [it] implemented a policy that it would no longer comply with selected provisions -- for example, the articles addressing dues withholding, official time, facilities and services, grievance procedures, that is "Union institutional benefits," as described by the Agency -- of the [legacy agreements] and past practices? If so, what shall be the remedy?

Award at 2.

In resolving the grievance, the Arbitrator discussed the decision of the Authority's regional director that had directed the election resulting in the certification of NTEU. In particular, the Arbitrator noted that the regional director had concluded that, under successorship principles, the newly defined unit of Agency employees was appropriate. *Id.* at 57. In addition, the Arbitrator stated that, after a collective bargaining agreement expires, the Statute requires that "existing personnel policies, practices and matters affecting working conditions continue to the maximum extent possible, upon the expiration of the agreement, absent an express agreement to the contrary or unless modified in a manner consistent with the Statute, *even [though] there has been a change in exclusive representatives*." *Id.* at 58 (citing *U.S. Nuclear Regulatory Comm'n*, 6 FLRA 18 (1981)). The Arbitrator found that, in the circumstances presented, the Agency failed to continue existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible. In so finding, he rejected the Agency's claim that there was no obligation under the Statute to continue policies and practices that pertained to the exclusive representatives rather than unit employees. Award at 59-60.

In addition, the Arbitrator stated that § 7114(a)(1) of the Statute entitles an exclusive representative to act for all employees in the unit and

that the newly hired CBPOs are part of the newly certified NTEU unit. *Id.* at 61. He concluded that "[t]he Agency's determination to treat the [newly hired CBPOs] as without union representation directly contravenes [§ 7114(a)(1)]." *Id.* Although the Arbitrator recognized "that problems will arise in the identification of personnel policies, practices, and matters affecting working conditions, i.e., contract, which cover the [newly hired CBPOs,]" he found that "the determination of which contract covers [newly hired CBPOs] is a condition of employment within the meaning of § 7103(a)(14)" and that "it must be negotiated between [the Agency] and [the Union]." *Id.* at 62. Based on the foregoing, the Arbitrator determined that, "[b]y asserting that no agreement covers these employees, [the Agency] acted unilaterally -- and contrary to law -- regarding a condition of employment." *Id.*

Further, the Arbitrator rejected the Agency's claim that the Union had waived its right to bargain by failing to request bargaining after the Agency had provided it with sufficient notice and an opportunity to bargain. In this regard, he found that the director's letter "made clear that it was implementing its plan, not inviting the Union to discuss it." *Id.* at 64. According to the Arbitrator, "[t]his was not, and cannot be twisted to be, a proposal and invitation." *Id.* The Arbitrator also found that the issuance of the post-certification guidance on the same date as the director's letter was evidence that the Agency was unilaterally implementing the disputed changes. *Id.* He also concluded that the Union had not waived its right to bargain because the Union had filed a timely grievance alleging that the Agency had failed to bargain. *Id.*

The Arbitrator concluded that the Agency violated § 7116(a)(1) and (5) of the Statute "and/or applicable past practice or provision of" the legacy agreements when it implemented a policy that it would no longer comply with certain past practices and provisions of those agreements. *Id.* at 65-66.

III. Preliminary Matters

A. Timeliness of the Agency's Exceptions

As noted previously, the Union filed a motion to dismiss the Agency's exceptions as untimely. The Union asserts that, although the Arbitrator served the award by regular mail, he also served the award by e-mail. The Union contends that, because of the e-mail service, the Agency was not entitled to the additional five days for filing that a party receives when an arbitrator serves an award by regular mail.

The Authority has held that e-mail is a legitimate method of service of arbitration awards by arbitrators and that five days are not added to the filing period when the award is served by e-mail. *E.g., Soc. Sec. Admin., Balt., Md.*, 64 FLRA 306, 306 (2009). However, when an award is served by two methods, the Authority determines the timeliness of exceptions based on the earlier date of service of the award. *E.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 60 FLRA 966, 967 (2005). Here, there is no dispute that the Arbitrator served the award by mail three days before he e-mailed a copy to the parties. Thus, under § 2429.22 of the Authority's Regulations, the Agency was entitled to an additional five days for filing, and its exceptions are timely. *Id.*

Accordingly, we deny the Union's motion and consider the Agency's exceptions.

B. Timeliness of the Union's Opposition

The Authority issued an order to the Union to show cause why its opposition should not be dismissed as untimely. The Union filed a response to the order in which it acknowledged that its opposition is untimely because it had deposited the opposition with a commercial delivery service that did not deliver the opposition to the Authority until three days later. The Union notes that, had it mailed its opposition on the day that it deposited the opposition with the commercial delivery service, the opposition would have been timely filed.[2] The Union asserts that the Authority should waive the time limit because the untimely commercial delivery is "a simple technical deficiency[,]" which did not prejudice the Agency. Response at 2.

Section 2429.23(b) of the Authority's Regulations permits the Authority to waive an expired time limit in "extraordinary circumstances." The Authority previously has declined to find extraordinary circumstances when a party conceded that its filing was "technically untimely" and failed to provide a sufficient basis to excuse the lack of

2. In this connection, under the Authority's Regulations that were in effect when the Union filed its opposition, the Authority considered documents filed by commercial delivery to be filed on the date they were received by the Authority; it considered documents filed by regular mail to be filed on the date on which they were postmarked or, absent a postmark, five days prior to receipt by the Authority. *See* former 5 C.F.R. § 2429.21(b). Effective November 9, 2009, and as relevant here, the Authority's Regulations were amended to treat filing of documents by commercial delivery in the same way as filing by U.S. mail. *See* 5 C.F.R. § 2429.22.

timeliness. *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 875, 877 (1990). Similarly, here, we do not consider the Union's opposition.

IV. Agency's Exceptions

The Agency contends that the award is incomplete and ambiguous. Specifically, the Agency claims that "[t]he award incompletely addresses successorship, thereby inaccurately suggesting that [the Union] was a full successor and, potentially, that the expired NTEU-Customs agreement sets conditions of employment for all bargaining unit members." Exceptions at 8. In addition, the Agency asserts that, if the award "holds that the NTEU-Customs contract applies to all bargaining unit members through successorship[,]" then "[t]he award is contrary to law[.]" *Id.* at 9.

In addition, the Agency asserts that the award as it pertains to newly hired CBPOs is in excess of the Arbitrator's authority and is contrary to the Statute. *Id.* at 10. Specifically, the Agency argues that "[t]he grievance . . . concerned only what the Agency had termed 'union institutional benefits.'" *Id.* (quoting stipulation, Award at 2). The Agency maintains that the grievance and the stipulated issue did not concern the conditions of employment of newly hired CBPOs and that, consequently, the Arbitrator exceeded his authority.

The Agency also argues that, "[t]o the extent that the award requires availability of a negotiated grievance procedure for [newly hired CBPOs], it is contrary to law." Exceptions at 12. In this connection, the Agency argues that the Statute does not require that unit employees have access to a negotiated grievance procedure until one has been negotiated to cover them. *Id.* The Agency also argues that the Statute requires it to maintain the conditions of employment of the newly hired CBPOs as they existed prior to the Union's certification until modified in a manner consistent with the Statute. In this respect, the Agency claims that, prior to the Union's certification, the newly hired CBPOs were -- and continue to be -- covered under an administrative grievance procedure. *Id.* The Agency further claims that their conditions of employment are not provided by any of the expired legacy agreements.[3] *Id.* at 13.

Finally, the Agency contends that the Arbitrator's conclusion that the Union did not waive its right to bargain is contrary to the Statute. According to the Agency, even assuming that the Agency changed unit employees' conditions of employment, it gave the Union "proper, timely notice of the proposed changes and the Union waived any right to bargain on the practices and on impact and implementation." *Id.* at 15.

V. Analysis and Conclusions

A. The award is not incomplete, ambiguous, or contradictory as to make implementation impossible.

The Authority will find an award deficient when the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible. *E.g., U.S. Dep't of the Army, Corps of Eng'rs, Walla Walla Dist., Pasco, Wash.*, 63 FLRA 161, 163 (2009). For an award to be found deficient on this ground, the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain. *NATCA*, 55 FLRA 1025, 1027 (1999) (Member Wasserman dissenting as to other matters).

Although the Agency argues that the award incompletely addresses successorship, it does not argue that the award is impossible to implement. Consequently, the Agency's exception fails to establish that the award is deficient, as alleged. *See id.* Accordingly, we deny this exception.

B. The Arbitrator exceeded his authority.

As relevant here, the Authority will find that arbitrators exceed their authority when they resolve an issue that was not submitted to arbitration. *E.g., U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 779 (2005) (then-Member Pope dissenting as to application) (*U.S. Mint*). The Authority accords arbitrators substantial deference in the determination of the issues submitted to arbitration. *E.g., Veterans Admin.*, 24 FLRA 447, 450 (1986) (*VA*). In cases in which the parties have stipulated the issue for resolution, arbitrators do not exceed their authority by addressing any issue that is necessary to decide the stipulated issue or by addressing any issue that necessarily arises from issues specifically included in the stipulation. *Id.* Moreover, in examining an arbitrator's interpretation of a stipulation of issues, the Authority grants the arbitrator the same substantial deference the Authority grants an arbitrator's interpretation of a

3. The Agency does not contest the Arbitrator's finding that it violated the Statute on the basis that it did not comply with the expired legacy agreements.

collective bargaining agreement. *E.g., Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 518 (1986).

Despite this deference, the Authority has consistently held that arbitrators must confine their decisions and remedies to those issues submitted to arbitration by the parties and that they "must not dispense their own brand of industrial justice." *U.S. Mint*, 60 FLRA at 779 (quoting *VA*, 24 FLRA at 450 (citing *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). Likewise, although arbitrators may legitimately bring their judgment to bear in reaching a fair resolution of a dispute submitted to them, they may not decide matters that are not before them. *U.S. Mint*, 60 FLRA at 780. Consequently, when the record demonstrates the mutual understanding of the parties as to the stipulated issue, an arbitrator's award must be consistent with the stipulation as understood by the parties. *Cf. Gen. Servs. Admin.*, 34 FLRA 1123, 1128 (1990) (*GSA*) (when the record demonstrated that the parties jointly intended another arbitrator to resolve an issue, the arbitrator under review exceeded his authority by resolving the issue).

The Union's grievances were specifically directed at the Agency's refusal to recognize provisions or practices of the legacy agreements related to what the Agency describes as "union institutional benefits." Exceptions, Attach. 16 at 1. In addition, the Union expressly focused on the practices and provisions pertaining to "official time, dues withholding, and facilities and services." *Id.* at 2. The grievances did not address the newly hired CBPOs. The grievances also did not request any remedy pertaining to newly hired CBPOs. The testimony of the Union's sole witness at the arbitration hearing never addressed the newly hired CBPOs. Likewise, the newly hired CBPOs were not addressed in any of the briefs that the parties submitted to the Arbitrator. In particular, in its post-hearing brief, the Union's arguments were directed solely to the Agency's alleged repudiation of various provisions of the legacy agreements that address "union institutional benefits[.]" Exceptions, Attach. 6 at 18-36. In that brief, the Union set forth its understanding of the term "Union institutional benefits[,]" as used in the issue stipulation. *Id.* at 12-13. The Union described these benefits as specific organizational benefits to the former exclusive representatives or procedures by which the former exclusive representatives and former agencies agreed to manage their relationships. *Id.* The Union also identified the provisions of the legacy agreements allegedly repudiated as pertaining to official time, dues withholding, and agency-provided facilities and equipment. *Id.* at 13.

This record demonstrates a mutual understanding of the parties that the stipulated issue did not encompass newly hired CBPOs. In these circumstances, the parties did not authorize the Arbitrator to address the issue of the Agency's treatment of newly hired CBPOs. Moreover, it was not necessary for the Arbitrator to address the Agency's treatment of newly hired CBPOs to decide the stipulated issue, and the issue of the Agency treatment of newly hired CBPOs did not necessarily arise from the stipulated issue. Consequently, the Arbitrator exceeded his authority by deciding a matter that was not before him. *See U.S. Mint*, 60 FLRA at 779-80; *GSA*, 34 FLRA at 1128.

Accordingly, we conclude the Arbitrator exceeded his authority by addressing the issue of the Agency's treatment of newly hired CBPOs.[4]

C. The award is not contrary to law.

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*. *E.g., 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. *E.g., NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

In addition, in a resolving a grievance that alleges an unfair labor practice (ULP) under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 431 (2010) (*IRS*). 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. *Id.* 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.*

4. In view of this conclusion, we do not address whether the award as it pertains to newly hired CBPOs is contrary to law.

1. Successorship

The Agency maintains that, if the Arbitrator found that the legacy agreement between the Union and the Customs Service applies to all employees in the newly certified unit through successorship, then the award is contrary to law. In resolving the grievance, the Arbitrator noted that the regional director had concluded that, under successorship principles, the newly defined unit of Agency employees was appropriate. However, the Arbitrator did not find that the legacy agreement between the Union and the Customs Service applies to all employees in the newly certified unit through successorship. Accordingly, the premise of the exception is misplaced, and we deny this exception.

2. Waiver

The Agency also contends that the Arbitrator erred by finding that the Union did not waive its right to bargain. A union does not waive its right to bargain over a change when the change is announced as a *fait accompli* and a request to bargain would be futile. *E.g.*, *U.S. Dep't of the Navy, Naval Avionics Ctr., Indianapolis, Ind.*, 36 FLRA 567, 572 (1990). In this regard, the Arbitrator found that the director's letter "made clear that it was implementing its plan, not inviting the Union to discuss it." Award at 64. According to the Arbitrator, "[t]his was not, and cannot be twisted to be, a proposal and invitation." *Id.* The Arbitrator also found that the issuance of the director's memo on the same date as the director's letter was evidence that the Agency was unilaterally implementing the disputed changes. *Id.* These factual findings support the Arbitrator's conclusion that the Union did not waive its right to bargain, and we deny this exception.[5] *See IRS*, 64 FLRA at 432.

VI. Decision

The award is set aside insofar as the Arbitrator addressed the Agency's treatment of newly hired CBPOs. The remaining exceptions are denied.

5. We also note that the Arbitrator found that, because the Union filed a grievance, it did not waive its right to bargain. In *POPA v. FLRA*, 872 F.2d 451, 455-56 (D.C. Cir. 1989), the court held that the union's protest of proposed changes and the filing of a ULP charge alleging a failure to bargain "did not waive its right to bargain[.]" The court noted that the principal remedy for such a ULP is a bargaining order and concluded that the filing of the ULP did not waive the right to bargain "as much as initiate it." *POPA*, 872 F.2d at 455. Although it is unnecessary to rely on the Arbitrator's alternative rationale for finding no waiver, we note that the court's decision provides additional support for the Arbitrator's conclusion.