65 FLRA No. 23

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-4494

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DECISION

September 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 Joseph M. Sharnoff 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 Arbitrator found that the Agency violated the parties' agreement and the Statute by unilaterally making several changes to the Agency's body-armor policy (the policy), and he awarded a partial status quo ante (SQA) remedy.[1] For the following reasons, we deny the exceptions.

II. Background and Arbitrator's Award

The Agency made several changes to the policy without giving the Union notice and an opportunity to bargain. The Union filed a grievance, which was unresolved and submitted to arbitration. At arbitration, the parties stipulated to the following issue: "Did the Agency violate the Collective Bargaining Agreement and/or law when it unilaterally implemented [the policy] . . . without first notifying the Union and providing it was an opportunity to negotiate to the fullest extent of the law? If so, what is the remedy?" Award at 3.

The Arbitrator found that there was no dispute that the Agency had an obligation to bargain only the impact and implementation, not the substance, of the changes. *Id.* at 5, 7. The Arbitrator found that the reasonably foreseeable effects of several of the changes were greater than de minimis, *id.* at 7-14, but determined that the reasonably foreseeable effects of one of the changes were de minimis, *id.* at 15. As the Agency failed to engage in impact and implementation bargaining before making the changes that were greater than de minimis, the Arbitrator sustained the grievance "to the extent set forth in the Opinion." *Id.* at 18.

As to remedy, the Arbitrator applied the factors set forth in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*), for assessing whether SQA relief is appropriate.[2] The Arbitrator granted the request for SQA relief, "but only to the extent that the Union . . . claimed that the Agency's unilateral implementation of the . . . policy resulted in changes in working conditions which were not de minimis and which claims were upheld by the Arbitrator." Award at 18.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the SQA remedy is contrary to management's right to determine internal security practices under § 7106(a)(1) of the Statute.[3]

1. Although the Arbitrator did not expressly state that he found a violation of the Statute, there is no dispute that the violation of "law" asserted in the grievance, *see* Award at 2, and sustained in part by the Arbitrator, *see id.* at 18, is a violation of the Statute.

2. The *FCI* factors are: (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, an SQA remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. 8 FLRA at 606.

3 We note that the Agency does not except to the Arbitrator's finding of an underlying statutory and

Exceptions at 5. In this connection, the Agency asserts that it had an internal security right to implement the policy. *Id.* at 8-9. In addition, the Agency asserts that, if it had complied with the law, then it would have given the Union the opportunity to engage in impact and implementation bargaining, but would not have maintained the status quo. *Id.* at 6-7. The Agency also asserts that it had "valid safety and operational impetuses" for making the changes, and it is "unreasonable" to direct the Agency to return to the status quo, as that "could result in scenarios that [would be] impractical, if not impossible[,]" including: requiring the Agency to issue body armor that is insufficient to protect employees; requiring the Agency to contract with vendors with whom the Agency no longer has contractual relationships; and allowing employees unfettered discretion as to whether to wear body armor on the range. *Id.* at 7-8. The Agency also asserts that the Authority, "in determining whether an ordered remedy is lawful, has examined cases concerning negotiability[]" and "utilized these negotiability determinations to decide whether an ordered remedy is permissible." *Id.* at 9 (citing *AFGE, Local 2006*, 58 FLRA 297 (2003) (*Local 2006*), and *U.S. INS, U.S. Border Patrol, San Diego Sector, San Diego, Cal.*, 43 FLRA 642 (1991) (*Border Patrol*)).

B. Union's Opposition

The Union argues that the award is not contrary to management rights. In this connection, the Union asserts that the Arbitrator did not require substantive, but only impact and implementation, bargaining. Opp'n at 7-8. In addition, the Union disputes the Agency's assertion that the remedy would force the Agency to issue less protective armor, and argues that the fact that the Agency may be required to contract with additional vendors does not demonstrate that the SQA remedy is inappropriate.[4] *Id.* at 11.

IV. Analysis and Conclusion

The Authority has held that "an arbitrator is empowered to fashion the same remedies in the arbitration of a grievance alleging the commission of an unfair labor practice as those authorized under [§] 7118 of the Statute." *NTEU*, 48 FLRA 566, 570 (1993). In addition, the Authority has held that § 7106(a) "limits the scope of bargaining rather than limiting the Authority's ability to issue remedial orders" under § 7118 of the Statute. *U.S. Dep't of the Air Force, 60th Air Mobility Wing, Travis Air Force Base, Cal.*, 59 FLRA 632, 639 (2004) (citing *Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250, 1256-58 (2000)). Consistent with this principle, the Authority has held that the fact that management has a right to implement a change that adversely affects employees does not provide a basis for denying an SQA remedy. *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 13 (2000).

Consistent with this precedent, the Agency's argument that the award is contrary to management's right to determine internal security practices under § 7106(a)(1) does not provide a basis for finding that the Arbitrator erred in awarding SQA relief. In addition, the Agency does not assert, or provide any basis for finding, that the Arbitrator misapplied the *FCI* factors. To the extent that the Agency's claim regarding the SQA relief being "unreasonable" could be construed as raising the fifth *FCI* factor – whether, and to what degree, the remedy would disrupt or impair the efficiency and effectiveness of the Agency's operations – the Authority has held that a conclusion that an SQA remedy would be disruptive to the operations of an agency must be based on record evidence. *E.g., U.S. DHS, Customs & Border Prot.*, 64 FLRA 989, 996 (2010) (Member Beck dissenting in part). The Agency does not provide any record evidence to support its assertion and, thus, does not provide a basis for setting aside the SQA remedy on this ground.

Moreover, the decisions cited by the Agency do not support a contrary conclusion. *Local 2006* held that it is not improper for an arbitrator, in determining whether a proposed interpretation of an agreement would be inconsistent with law or

contractual violation; rather, the Agency excepts only to the SQA remedy.

4. The Union also asserts that it was contrary to law for the Arbitrator to direct the Agency to bargain only to the extent that the Arbitrator found individual aspects of the policy to be greater-than-de-minimis changes. *See* Opp'n at 12. The Union asserts that, "[i]f the Authority should find this argument is not within the scope of the exceptions raised by the Agency, then the Union requests that it be considered as a cross exception[]" or, alternatively, that the Authority "may address, sua sponte, matters that were not excepted to by the parties." *Id.* at 12 n.8 (citations omitted). To the extent that the Union is excepting to the award, the exception is untimely, as the award was served on the parties on January 25, 2009, and the Union filed its opposition on April 6, 2009. *See* 5 U.S.C. § 7122(b) (exception must be filed "during the 30-day period beginning on the date the award is served on the party"). In addition, this time limit cannot be extended or waived. 5 C.F.R. § 2429.23(d); *accord SSA, Balt., Md.*, 64 FLRA 306, 306 (2009). Accordingly, we do not consider the Union's assertion.

regulation, to rely on Authority negotiability precedent. 58 FLRA at 299. In *Border Patrol*, the Authority addressed the negotiability of a union's proposals in order to determine whether the agency violated the Statute by implementing a change after declaring the proposals nonnegotiable. 43 FLRA at 653-63. Neither decision held that an SQA remedy is limited by the negotiability of any union proposals, and, in any event, the Agency never gave the Union an opportunity to develop any proposals in this case. Thus, the decisions cited by the Agency are inapposite and do not provide a basis for setting aside the award.

For the foregoing reasons, the award is not contrary to management's right to determine internal security practices. Accordingly, we deny the exceptions.

V. Decision

The exceptions are denied.