65 FLRA No. 152

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 220
(Union)

and

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND
(Agency)

0-AR-4509

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DECISION

April 22, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Charles Feigenbaum 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 Union's exceptions.[2]

The Union filed a grievance alleging that the Agency violated the parties' collective bargaining agreement (CBA) when more than one management official (official) participated in initial performance discussions with individual employees (expectation discussions). The Arbitrator found that the Statute precluded him from adopting the Union's proposed interpretation of the CBA, and he denied the grievance.

For the reasons that follow, we grant the Union's contrary-to-law exception and remand the award to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Award

At the beginning of the performance evaluation year (year), the Agency's bargaining-unit employees (employees) meet individually with management to conduct expectation discussions, in which the participants "attempt to arrive at a full and complete understanding" of employees' performance plans. Award at 3 (quoting CBA Art. 21, § 5 ("Expectation Discussions")). The Union filed a grievance alleging that the Agency violated the CBA when, in some instances, more than one official attended an employee's expectation discussion. *Id.* at 1-2, 4-5. When the grievance was unresolved, the parties proceeded to arbitration, where the Arbitrator defined the issues as follows:

> 1. *Threshold Issue* - Does the Agency have the management right under [§ 7106(a)(2)(B) of the Statute] to have two or more . . . officials present when conducting . . . expectation[] discussions . . .? If not,
>
> 2. *Substantive Issue* - Did the Agency violate the [CBA] by assigning two or more . . . officials to be present when conducting . . . expectation[] discussions . . .? If so, what shall be the remedy?

Id. at 2.

Addressing the threshold issue, the Arbitrator found that, although "the Union's interpretation of Article 21 [of the CBA] [(Article 21)] would not dictate . . . [whether] a specific individual or [position] could or could not attend an expectation discussion[,]" it would limit the number of officials who could attend an expectation discussion. *Id.* at 13. In this regard, the Arbitrator found that management's right to assign work under § 7106(a)(2)(B) of the Statute (§ 7106(a)(2)(B)) "includes the right to give a managerial task to more than one . . . official." *Id.* at 13-14 (citing *U.S. Dep't of VA, Alaska VA Healthcare Sys., Anchorage, Alaska*, 60 FLRA 968 (2005) (*Alaska VA*); *U.S. Dep't of HHS, Health Care Fin. Admin.*, 57 FLRA 462 (2001) (*HCFA*)). Thus, the Arbitrator concluded that the Union's interpretation of Article 21 "would impermissibly interfere with the management right to assign work" by limiting the number of officials at expectation discussions. *Id.* at 10-11; *see also id.* at 15.

1. Member Beck's separate opinion, concurring in the result, is set forth at the end of this decision.

2. This case relates to *Social Security Administration*, 65 FLRA 638 (2011) (*SSA*), which involved the same parties and a similar matter, but a different arbitrator.

The Arbitrator acknowledged that a prior arbitration award by a different arbitrator had enforced a similar provision of the CBA as a procedure under § 7106(b)(2) of the Statute (§ 7106(b)(2)) despite the limitation that the provision placed on the number of officials at performance discussions.[3] *Id.* at 11. However, the Arbitrator concluded that the Union's interpretation of Article 21 would constitute a "direct limitation" on the right to assign work and, thus, could not constitute a procedure under § 7106(b)(2). *Id.* at 15. Moreover, the Arbitrator determined that, because the threshold issue before him involved the correct "reading of a statute[,]" the rationales for giving deference to another arbitrator's "contract interpretation" did not apply. *Id.* at 11.

Based on his conclusion that he could not "issue an award that granted th[e] grievance . . . without violat[ing]" management's right to assign work under the Statute, the Arbitrator denied the grievance. *Id.* at 10-11; *see also id.* at 15.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to law because it "[i]nterprets [m]anagement's [r]ight to [a]ssign [w]ork under . . . § 7106(a)(2)(B) in an [o]verly [b]road and [e]xpansive [m]anner" that prevents the Union from "seek[ing] . . . enforcement . . . of contract provisions . . . negotiated pursuant to" § 7106(b). Exceptions at 5. The Union asserts that, because its interpretation of Article 21 would not prevent management from conducting expectation discussions or from determining which official participates in those discussions, *see id.* at 8, 11, the provisions of Article 21 concerning expectation discussions are enforceable as procedures under § 7106(b)(2), *id.* at 7, and the Arbitrator's failure to enforce them is contrary to law, *see id.* at 12. Although the Union recognizes that the Arbitrator "decided the case on a threshold question of law," the Union argues that the award fails to draw its essence from the CBA because the Arbitrator did not consider the Union's evidence in support of its interpretation of Article 21. *Id.* at 11-12.

B. Agency's Opposition

The Agency argues that the right to assign work under § 7106(a)(2)(B) includes "the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned[,]" Opp'n at 3 (citing *Alaska VA*, 60 FLRA at 970; *HCFA*, 57 FLRA at 463; *AFGE, Local 1985*, 55 FLRA 1145, 1148 (1999) (*Local 1985*)), as well as "the right to 'assign additional supervisory duties to an employee who is already a supervisor[,]'" *id.* (citation omitted). The Agency argues further that the Union's interpretation of Article 21: (1) rests on a flawed assertion that management may effectively "bargain[] away" the right to assign work by agreeing to procedures under § 7106(b)(2), *id.*; and (2) conflicts with Authority decisions finding that procedures under § 7106(b)(2) may not "requir[e] an employee's supervisor to perform certain duties, or preclude that supervisor from performing certain duties," *id.* at 3, 5-7 (citing *AFGE, Local 3529*, 56 FLRA 1049, 1051-52 (2001) (*Local 3529*); *NAGE, Local R1-100*, 56 FLRA 268, 272 (2000) (*Local R1-100*); *U.S. Dep't of the Navy, Phila. Naval Shipyard, Phila., Pa.*, 49 FLRA 1363, 1368 (1994) (*Navy*); *AFGE, Local 1409*, 38 FLRA 747, 752-53 (1990) (*Local 1409*); *NFFE, Local 78*, 9 FLRA 819, 819-20 (1982) (*Local 78*)). Thus, the Agency contends that the Arbitrator correctly found that the Union's interpretation of Article 21 would be contrary to management's right to assign work. *Id.* at 8.

IV. Analysis and Conclusions

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.*

The Authority recently revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-

3. We note that the prior arbitration award, to which the Arbitrator referred, was the award at issue in *SSA*, 65 FLRA 638. *See supra* note 2.

07 (2010) (Chairman Pope concurring). As relevant here, a contract provision interpreted so as to affect the exercise of a management right is contrary to law, as interpreted, unless it was negotiated under § 7106(b). *See EPA*, 65 FLRA at 115.

As discussed in *SSA*, 65 FLRA at 640, and as stated in the Agency's opposition, Opp'n at 3, the right to assign work under § 7106(a)(2)(B) includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *See Local 1985*, 55 FLRA at 1148 (citations omitted). For example, the Authority has held that a contract provision interpreted to limit the number of agency representatives at meetings with employees affects management's right to assign work. *See SSA*, 65 FLRA at 640 (contract provision interpreted to restrict agency's ability to assign more than one official to mid-year performance discussions affected right to assign work); *see also Alaska VA*, 60 FLRA at 970 (citing *HCFA*, 57 FLRA at 463 (contract provision interpreted to restrict agency's ability to assign more than one representative to Step 1 grievance meetings affected right to assign work)). The Union's proposed interpretation of Article 21 would limit the number of officials that the Agency may assign to conduct an expectation discussion. Therefore, consistent with the above-cited precedent, we find that, under the Union's proposed interpretation, Article 21 would affect the right to assign work.

However, as explained in *SSA*, so long as contract provisions do not specify the particular persons or positions who will perform a task, those provisions may constitute enforceable procedures under § 7106(b)(2) notwithstanding their effect on the number of employees, including officials, who will perform the task. *See* 65 FLRA at 640. Under the Union's proposed interpretation of Article 21, the Arbitrator found – and the Union concedes – that the Agency would retain the authority to designate the official who participates in any given expectation discussion. *See* Award at 13; Exceptions at 8, 11. Thus, consistent with *SSA* and the precedents discussed therein, the fact that the Union's proposed interpretation of Article 21 would affect the number of officials who may attend expectation discussions does not preclude a finding that the pertinent provisions of that article would operate as procedures under § 7106(b)(2).

Moreover, when determining whether contract provisions involving performance discussions constitute procedures under § 7106(b)(2), the Authority has noted that agencies have a statutory duty, under 5 U.S.C. § 4302(a)(2) (§ 4302(a)(2)), to "encourage employee participation in establishing performance standards[.]" *E.g.*, *SSA*, 65 FLRA at 640 (citing *Patent Office Prof'l Ass'n*, 47 FLRA 10, 30-31 (1993); *Patent Office Prof'l Ass'n*, 29 FLRA 1389, 1389-92 (1987); *AFGE, AFL-CIO, Local 32*, 3 FLRA 783, 788-89 (1980) (*Local 32*)). This duty includes an obligation "to bargain on procedures which management officials will observe in the development *and implementation* of performance standards[,]" *NTEU*, 35 FLRA 254, 256 (1990) (emphasis added), such as "the form of the employee participation" required by § 4302(a)(2), *Local 32*, 3 FLRA at 789.

For example, in *SSA*, the Authority examined a contract provision that, as interpreted by the arbitrator, restricted the agency's ability to assign more than one management official to mid-year performance discussions. *See* 65 FLRA at 640. The Authority noted that, as interpreted, the provision at issue did not permit an employee to alter the content of performance standards or to select which management official would participate in the employee's mid-year discussion. *See id.* at 640-41 (citing *NFFE*, 13 FLRA 426, 426-28 (1983)). Rather, the Authority found that the arbitrator interpreted the provision in *SSA* so that it regulated the manner in which a "joint planning and communication process" concerning performance standards would occur between management and an employee. *See id.* (quoting *NTEU*, 42 FLRA 964, 972-79 (1991)) (internal quotation marks omitted). Consequently, the Authority found that the provision at issue operated as a procedure under § 7106(b)(2), which was consistent with the agency's obligation under § 4302(a)(2). *Id*.

As interpreted by the Union, the provisions of Article 21 concerning expectation discussions would operate in much the same way as the provision found to be a procedure in *SSA*. Thus, *SSA* and the other above-cited precedents support a conclusion that the pertinent provisions of Article 21, as interpreted by the Union, would operate as procedures under § 7106(b)(2).

The decisions cited by the Agency and Arbitrator do not support a contrary conclusion. In those decisions, the Authority found that contractual provisions, as interpreted, either: (1) did not constitute procedures under § 7106(b)(2) because they prescribed or precluded assignments to a particular individual *identified by name or title*; or (2) contravened management's rights *in the absence*

of any assertion that the provisions were lawful under § 7106(b). *See Alaska VA*, 60 FLRA at 970 & n.2 (no assertion provision negotiated pursuant to § 7106(b)); *HCFA*, 57 FLRA at 463 (same); *Local 3529*, 56 FLRA at 1051 (provision requiring assignment of appraisal duties to every supervisor for whom a "Specialist performs 150 hours or more of work" not a procedure); *Local R1-100*, 56 FLRA at 272 (no assertion provision negotiated pursuant to § 7106(b)); *Navy*, 49 FLRA at 1368 (contract interpretation forbade additional assignments to supervisor "Simmons"); *Local 1409*, 38 FLRA at 752-53 (requiring "the Commander" to exercise discretion in a matter was "inconsistent with" right to assign work); *Local 78*, 9 FLRA at 819-20 (requiring "Assistant Director, Personnel Officer[,] and . . . Division Chief" to sit on selecting panel would "eliminat[e] . . . discretion inherent" in right to assign work). By contrast, as stated previously, the Union's proposed interpretation of Article 21 would *not identify* the official who would participate in any given expectation discussion, and the Union *does assert* that Article 21 operates pursuant to § 7106(b)(2). In addition, although the Authority in *Alaska VA* stated that it had not *previously* found a provision limiting the number of agency representatives at meetings with employees to constitute a procedure, the Authority made no finding as to whether such a provision *could* constitute a procedure, *see* 60 FLRA at 970. Thus, *Alaska VA* does not support finding that, as interpreted by the Union, the pertinent provisions of Article 21 would not constitute procedures.

For the foregoing reasons, we find that, under the Union's proposed interpretation of Article 21, the provisions of the article concerning expectation discussions would be enforceable as procedures under § 7106(b)(2), and the Arbitrator erred, as a matter of law, in concluding otherwise. Therefore, we grant the Union's contrary-to-law exception and remand the award to the parties for resubmission to the Arbitrator, absent settlement, so that he may determine the meaning of the CBA's provisions concerning expectation discussions and resolve the "substantive issue" set forth in the award.[4]

V. Decision

The Union's contrary-to-law exception is granted, and the award is remanded to the parties for resubmission to the Arbitrator, absent settlement.

Member Beck, Concurring in the result:

I agree with my colleagues that this matter should be remanded for resolution of the "substantive issue" presented by the Union's grievance. However, I arrive at this conclusion for different reasons than those employed by my colleagues.

My colleagues accept the Arbitrator's assertion that he was obliged to rule on the "threshold issue," Award at 2, which required him to engage in a legal analysis about management rights. They then address the same legal question that the Arbitrator purported to address and, applying a de novo standard of review, they arrive at a different conclusion than did the Arbitrator.

The problem with the Arbitrator's approach is that he need not have addressed – indeed, he should not have addressed – what he characterized as the "threshold issue." The Arbitrator was required only to interpret Article 21 and determine what contractual obligations or restrictions it imposed on the Agency in terms of conducting expectation discussions. It was beyond the Arbitrator's purview to determine whether Article 21 is or is not consistent with Section 7106(a)(2)(B) of the Statute; this question was answered when the Agency agreed to include Article 21 in the CBA and thereby conceded that, if it affects management's statutory rights at all, it is a permissible limitation on those rights.

4. The Union concedes that the award rests entirely on the Arbitrator's answer to a threshold question of law. Exceptions at 11. As the Arbitrator has not yet interpreted the CBA, the Union's essence exception is premature. Therefore, we decline to address the Union's essence exception.