

65 FLRA No. 153

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 506
(Union)

0-AR-4371

—
DECISION

April 22, 2011
—

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 Richard John Miller 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 directed the Agency to allow the placement of certain documents in the file that the Agency compiles when it investigates a guard alleged to have engaged in misconduct (guard's investigation file).

For the reasons discussed below, we dismiss the exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The Union represents guards at a federal correctional complex. *See* Award at 8. At times, a special investigative agent (agent) will interview a guard alleged to have engaged in misconduct. *See id.* at 20. After the agent has interviewed the guard, the agent writes a statement that expresses the guard's

answers in a narrative format (agent-authored affidavit). *See id.* at 21. The agent then presents the agent-authored affidavit to the guard for his or her signature. *See id.* at 21-22. Once the guard has had an opportunity to make changes or corrections, *see id.* at 21, the guard signs the agent-authored affidavit, *see id.* at 22. The agent-authored affidavit, along with other evidence, is placed in the guard's investigation file. *See id.* at 20.

The Union filed a grievance alleging that agent-authored affidavits should be written in a question-and-answer, rather than narrative, format. *See id.* at 11. The parties could not resolve the grievance and submitted it to arbitration. *See id.* As relevant here, the parties agreed to have the following issues resolved: (1) did the Agency violate the parties' agreement when it refused to have agent-authored affidavits written in a question-and-answer format; (2) does a guard have the right to have a copy of an agent's questions placed in the guard's investigation file; (3) does a guard have the right to submit a supplemental affidavit in his or her own words (guard-authored affidavit); and (4) if the answer to any of these questions is in the affirmative, then what should be the remedy. *See id.* at 7-8.

The Arbitrator rejected the Union's claim that agent-authored affidavits were required to be written in a question-and-answer format. *See id.* at 23, 31. As to the Union's claim that a guard has the right to have a copy of an agent's questions placed in the guard's investigation file, the Arbitrator stated that requiring this would "assist the [guards].]" would "assist Agency reviewers . . . in ascertaining why [a guard] answered the question in [a] particular manner[.]" *id.* at 29-30, and would "assist everyone in the recalling of the information" at a hearing, *id.* at 30. Thus, the Arbitrator concluded that a guard has the right to have a copy of the questions placed in the guard's investigation file. *Id.* at 31. As to the Union's claim that a guard has the right to submit a guard-authored affidavit to the Agency, the Arbitrator stated that an Agency regulation, Internal Affairs Program Statement 1210.24, provides that the Agency will "prepare or accept in total the affidavit[s]." ¹ *Id.* at 30. The Arbitrator determined that "accept in total" means that a guard "has the right to prepare an affidavit in his/her own words" and have the affidavit placed in the guard's

1. Internal Affairs Program Statement 1210.24 states, in pertinent part: "Affidavits addressing all salient issues will be obtained during an investigation. The Agency investigators will prepare or accept in total the affidavit." Award at 30.

investigation file. *Id.* Accordingly, the Arbitrator concluded that a guard has the right to provide a guard-authored affidavit to the Agency and have it placed in the guard's investigation file. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to management's right to discipline under § 7106(a)(2)(A) of the Statute. *See* Exceptions at 4 (citing *AFSCME, Local 2830*, 60 FLRA 124, 127 (2004)) (*AFSCME*). Additionally, the Agency argues that the award is contrary to management's right to determine its internal security practices under § 7106(a)(1) of the Statute. *See id.* (citing *AFGE, Local 701, Council of Prison Locals 33*, 58 FLRA 128, 131 (2002) (Chairman Cabaniss concurring in part and dissenting in part; then-Member Pope dissenting in part)) (*Local 701*). The Agency asserts that the right to determine internal security practices includes the right to determine the "investigative techniques management will employ to attain its internal security objectives," and adds that "obtaining truthful and reliable information from interviewees constitute internal security practices[.]" *Id.* In addition, the Agency contends that the "limitations imposed by the Arbitrator on the information the Agency can include or exclude from its investigative files" affect the cited management rights because they "dictate[] to the Agency the manner in which it conducts investigations and gathers information." *Id.* Further, the Agency asserts that the award does not enforce a procedure under § 7106(b)(2) of the Statute or an appropriate arrangement under § 7106(b)(3) of the Statute. *Id.* at 4-5, 7.

B. Union's Opposition

The Union argues that the Agency's exceptions should be dismissed as untimely. *See* Opp'n at 1-2.

IV. Analysis and Conclusions

A. The Agency's exceptions were timely filed.

Where an arbitration award's date of service is not in the record, the date of an award is presumed to be the date of service. *E.g. FDIC*, 64 FLRA 1177, 1181 (2010) (*FDIC*). Exceptions to an arbitrator's award must be filed "during the [thirty]-day period beginning on the date the award is served on the party[.]" 5 U.S.C. § 7122(b). Under the Authority's Regulations that were in effect when the Agency

filed its exceptions, the thirty-day period included date of service of award.² *See* 5 C.F.R. § 2425.1(b). When an award is served by mail, five days are added to the thirty-day filing period. *See* 5 C.F.R. § 2429.22.

The date of service of the award is not in the record. Thus, the date of the award, April 2, 2008, is presumed to be the date of service.³ *See, e.g., FDIC*, 64 FLRA at 1181. Counting thirty days beginning on, and including, April 2, the due date for filing exceptions was May 1. *See* 5 C.F.R. § 2425.1(b). Because the award was served by mail, five days are added to that due date, resulting in a due date of May 6. *See* 5 C.F.R. § 2429.22. As the Agency filed its exceptions on May 6, the Agency's exceptions are timely. Accordingly, we consider the Agency's exceptions.

B. 5 C.F.R. § 2429.5 bars the Agency's exception regarding management's right to discipline under § 7106(a)(2)(A) of the Statute.

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5 (§ 2429.5). Under § 2429.5, the Authority will not consider an issue that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008).

Here, the issues that the Agency agreed to permit the Arbitrator to determine included whether a guard has the right to have a copy of an agent's questions placed in the guard's investigation file, whether a guard has the right to submit a guard-authored affidavit, and if so, what should be the remedy. *See* Award at 7-8. As such, the Agency could have argued to the Arbitrator that requiring the Agency to place an agent's questions and a guard-authored affidavit in the guard's investigation file would affect management's right to discipline. *See, e.g.,*

2. The Authority's Regulations concerning the review of arbitration awards, including § 2425.1, as well as certain related procedural Regulations, including §§ 2429.5 and 2429.22, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Union's exceptions were filed before that date, we apply the earlier Regulations.

3. All dates are in 2008 unless otherwise specified.

AFSCME, 60 FLRA at 127-28. The Agency did not do so. See Exceptions, Attach., Agency's Post-Hearing Brief at 16. Accordingly, we dismiss this exception under § 2429.5.

- C. The award is not contrary to management's right to determine its internal security practices under § 7106(a)(1) of the Statute.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and 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 has 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, 106-07, (2010) (Chairman Pope concurring). Under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right.⁴ *EPA*, 65 FLRA at 115. If it does not, then the Authority denies the exception. E.g., *Soc. Sec. Admin.*, 65 FLRA 523, 525-26 (2011) (*SSA*).

4. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the award affects the exercise of the asserted management right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. See *EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 462 n.2 (2011); *Soc. Sec. Admin., Dallas Region*, 65 FLRA 405, 408 n.5 (2010); *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010); *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010). Member Beck would conclude that the Arbitrator's award is a plausible interpretation of the parties' agreement and deny the exception.

The right to determine internal security practices under § 7106(a)(1) of the Statute includes the authority to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel, physical property, or operations. E.g., *U.S. DHS, Customs & Border Prot. Agency, N.Y.C., N.Y.*, 61 FLRA 72, 76 (2005) (then-Member Pope concurring) (*DHS*). Where an agency shows a link or reasonable connection between its objective of safeguarding its personnel, property, or operations and, as relevant here, an investigative technique designed to implement that objective, the Authority will find that an arbitration award that conflicts with the policy or practice affects management's right to determine internal security practices. See *Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 56 FLRA 398, 403 (2000) (Member Wasserman concurring) (*Customs*). In this regard, although "techniques aimed at obtaining truthful and reliable information from interviewees [may] constitute internal security practices[.]" an agency must show a "link, or reasonable connection" between those techniques and the agency's internal security objectives in order to demonstrate that the award affects this management right. *Customs*, 56 FLRA at 403. Cf. *AFGE, Prison Council 33*, 51 FLRA 1112, 1116 (1996) (finding a connection between techniques designed to promote candid and truthful answers during investigations of employee wrongdoing and agency's internal security objectives).

If an agency fails to demonstrate a link or reasonable connection between its investigative techniques and its security objectives, then the Authority will find no effect on management's right to determine internal security. See *SSA*, 65 FLRA at 526 (agency failed to show link between safeguarding computer system and practice of disallowing retired employee to have access to agency e-mail and a limited number of other programs). See also *AFGE, Local 1547*, 63 FLRA 174, 176 (2009) (*Local 1547*) (agency failed to show link between collecting Social Security numbers and dates of birth for parking registration and agency's plan to secure its personnel, physical property, and operations); *DHS*, 61 FLRA at 76 (agency failed to demonstrate that the particular amount of ammunition available to employees to practice for firearms qualification had internal security ramifications); *NFFE, Local 2050*, 36 FLRA 618, 639-40 (1990) (agency failed to show link between notifying employees of criminal activity near agency office and agency's internal security practices).

Here, the Agency asserts that the award imposes limitations that “dictate[] to the Agency the manner in which it conducts investigations and gathers information[,]” and asserts that “obtaining truthful and reliable information from interviewees” is an internal security practice. Exceptions at 4. However, the Agency does not cite a security objective to which the Agency’s asserted investigative techniques -- specifically, declining to place a copy of an agent’s questions and a guard-authored affidavit in a guard’s investigation file -- are connected. *Cf. Local 1547*, 63 FLRA at 176 (agency “fail[ed] to explain even briefly how or why ‘collection of information’ is involved in its internal security procedures or policies”). In this connection, with regard to the third issue -- whether a guard has the right to submit a guard-authored affidavit -- the award does not affect the Agency’s ability to conduct investigations and investigatory interviews as it always has, or to include agent-authored affidavits in a guard’s investigation file as it always has, or to arrive at disciplinary decisions as it always has. In other words, the award does not alter the manner, scope, or results of any misconduct investigation.⁵ As the Agency has not demonstrated a link or reasonable connection between its asserted investigative techniques and its security objectives, we find that the Agency has not demonstrated that the award affects management’s right to determine its internal security practices. *See Local 1547*, 63 FLRA at 176. Further, *Local 701*, 58 FLRA at 131, cited by the Agency, does not support a contrary conclusion, because the union in *Local 701* conceded that the provision at issue affected the right to determine internal security practices, and, accordingly, the Authority did not address the issue. *See Local 701*, 58 FLRA at 132.

Based on the foregoing, we deny this exception. As the Agency’s remaining exceptions are premised on the assumption that the award affects a management right, we find that it is unnecessary to consider the remaining exceptions. *See NFFE, Local 2050*, 35 FLRA 706, 715-16 (1990) (finding it

unnecessary to determine whether proposal was an appropriate arrangement where proposal did not affect any management right).

V. Decision

The Agency’s exceptions are dismissed in part and denied in part.

5. With regard to the second issue -- whether a guard has the right to have a copy of an agent’s questions placed in the guard’s investigation file -- we note that the Arbitrator resolved the issue by finding that placing a copy of an agent’s questions in the guard’s investigation file would “assist” the parties. Award at 30. The Arbitrator did not find that the Agency violated the parties’ agreement or policy. *See id.* at 29-31. Nevertheless, the parties agreed that the second issue was whether a guard has a “right” to have a copy of an agent’s questions placed in the guard’s investigation file, *id.* at 4, and there is no contention that the Arbitrator exceeded his authority by resolving the issue.