

67 FLRA No. 157

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1210
NATIONAL IMMIGRATION
AND NATURALIZATION SERVICE COUNCIL
(Union)

0-AR-4901

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DECISION

September 30, 2014

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Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Agency merged the position descriptions of inspectors, who were originally part of the former Immigration and Naturalization Service (INS) and U.S. Customs Service (USCS), into one new position: Customs Border Protection Officer (CBP officer). The former INS inspectors (immigration inspectors) were represented by the Union, and the former USCS inspectors (customs inspectors) were represented by the National Treasury Employees Union (NTEU). After the merger, the Union filed a grievance alleging that there was an improper pay disparity between the immigration inspectors and the customs inspectors.

Arbitrator Louise Berman Wolitz issued an award finding that the Agency violated Articles 2.A and 11.B(11) of the parties' collective-bargaining agreement based on her conclusion that the Agency violated 5 U.S.C. §§ 2301, 2302, and 9701,¹ 6 U.S.C. § 461,²

19 U.S.C. § 267a, and the Federal Register notice "Overtime Compensation and Premium Pay for Customs Officers" (the Notice).³

The Agency argues that the award is contrary to law for two reasons: (1) the Union's grievance was not arbitrable because earlier-filed equal-employment-opportunity (EEO) complaints and unfair-labor-practice (ULP) charges barred the grievance; and (2) the Arbitrator's determination that the Agency violated the above-mentioned authorities is contrary to law. Because the Arbitrator's merits determination is contrary to law, we grant the Agency's exception and set aside the award. And because we have set aside the award on the merits, it is unnecessary for us to resolve the Agency's exception that the award is contrary to law on substantive-arbitrability grounds.

II. Background and Arbitrator's Award

In 2004, the Agency merged immigration inspectors and customs inspectors into the position of CBP officer. Before this merger, the customs inspectors received premium pay pursuant to the Foreign Language Award Program (FLAP) for foreign-language proficiency under an agreement between NTEU and the USCS. They continued to receive this pay after the position merger. By contrast, immigration inspectors represented by the Union were not receiving FLAP premiums before the merger, nor did the Agency begin paying them premiums after the merger. Rather, the Agency informed the Union and NTEU of its intention to create a unified FLAP system for all CBP officers. The Union, NTEU, and the Agency reached agreement regarding the new FLAP in 2007.

Before reaching agreement, however, the Union filed a grievance over the FLAP issue. The grievance alleged that the Agency violated laws concerning the merit-system principle of equal pay for equal work, which, in turn, constituted a violation of the parties' agreement. The grievance was unresolved and the parties proceeded to arbitration.

The Arbitrator found in favor of the Union, rejecting the Agency's contentions that it was not required – or even permitted – to unilaterally extend the existing FLAP to immigration inspectors. The Arbitrator acknowledged the Agency's argument that establishing a FLAP was discretionary – 5 U.S.C. § 267a, which

¹ The award and briefs incorrectly refer to this provision as § 9701 of the Homeland Security Act of 2002. Rather, § 841 of the Homeland Security Act is primarily codified as 5 U.S.C. § 9701. Pub. L. No. 107-296, § 841, 116 Stat. 2135, 2229-34 (2002).

² The award and briefs refer to this provision as § 881 of the Homeland Security Act of 2002. Pub. L. No. 107-296, § 881, 116 Stat. at 2246 (codified at 6 U.S.C. § 461).

³ 69 Fed. Reg. 35,229 (June 24, 2004) (amending 8 C.F.R. § 103.1, 19 C.F.R. § 24.16).

authorizes FLAPs, provides that “[c]ash awards for foreign language proficiency may, under regulations prescribed by the Secretary of the Treasury, be paid to customs officers.” But she determined that, having established a FLAP, the Agency could not pay a FLAP to one group of CBP officers (customs inspectors) while withholding it from another group of CBP officers (immigration inspectors). She found that by doing so the Agency violated 5 U.S.C. § 2301(b)(3), which provides, in relevant part: “Equal pay should be provided for work of equal value” Although the Arbitrator noted the Agency’s argument that § 2301 is “not self-executing,”⁴ she found that 5 U.S.C. § 9701, 6 U.S.C. § 461, and the Notice evidenced the “intent to apply merit[-]system principles.”⁵ The Arbitrator did not address the Agency’s claim that a number of earlier-filed ULP charges and EEO complaints barred the grievance, pursuant to §§ 7116(d) and 7121(d).⁶

Title 5, § 9701 of the U.S. Code permits the Secretary of Homeland Security to establish a human-resources-management system for the Department and provides, in relevant part, that the system “shall . . . not waive, modify, or otherwise affect . . . the public employment principles of merit and fitness set forth in [5 U.S.C. §] 2301, including . . . equal pay for equal work.” Title 6, § 461 of the U.S. Code required the Secretary of Homeland Security to submit a plan “for ensuring, to the maximum extent practicable, the elimination of disparities in pay and benefits throughout the Department, especially among law[-]enforcement personnel, that are inconsistent with merit[-]system principles set forth in [5 U.S.C. § 2301].” Finally, the Notice amended 19 C.F.R. § 24.16(b)(7) to include CBP Officers within the definition of “customs officer” and amended 8 C.F.R. § 103.1 to transfer the duties of “immigration officers” to “customs officers.”⁷

The Arbitrator did not rely on the portions of the Notice codified in the Code of Federal Regulations, but instead looked to the supplementary information included in the Notice. The supplementary information explains that the reason for changing the definition of “customs officer” was to “creat[e] a single overtime and premium[-]pay system instead of the three different systems that [were then] in place,” and that it was “a key step to implementing the ‘one[-]face[-]at[-]the[-]border’

initiative by harmonizing the pay systems for the personnel who perform [customs, immigration, and agricultural-inspection] functions.”⁸ The Notice also goes on to state that continuing “to pay incumbents of the same position under different overtime systems” was not “feasible” and that it would not be “fair to employees to pay them differently when they are working side by side, performing the same type of work.”⁹

Based on her finding that the Agency violated the above-mentioned authorities, the Arbitrator concluded that the Agency violated Articles 2 and 11 of the parties’ agreement and 5 U.S.C. § 2302(b)(12). Article 2.A provides:

In the administration of all matters covered by this [a]greement, the parties are governed by existing or future laws; and government-wide rules or regulations in effect upon the effective date of this [a]greement. In the administration of this [a]greement, should any conflict arise between the terms of this [a]greement and any present or future laws, provisions of such laws shall supersede conflicting provisions of this [a]greement.

Section 2302(b)(12) provides:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in [§] 2301 of this title.

Article 11.B(11) essentially repeats 5 U.S.C. § 2302(b)(12).

The Agency filed exceptions to the Arbitrator’s award, and the Union filed an opposition to the Agency’s exceptions.

⁴ Award at 35 (summarizing Agency’s position); *accord* Exceptions, Attach. P, Agency’s Post-Hr’g Br. at 11 (quoting *U.S. Dep’t of the Air Force, 81st Training Wing, Keesler Air Force Base, Miss.*, 60 FLRA 425, 429 (2004)).

⁵ Award at 40.

⁶ See 5 U.S.C. §§ 7116(d) (requiring election between ULP procedure and negotiated grievance procedure), 7121(d) (requiring election between EEO procedure and negotiated grievance procedure).

⁷ 69 Fed. Reg. at 35,235.

⁸ Award at 40 (quoting 69 Fed. Reg. at 35,230) (internal quotation marks omitted).

⁹ *Id.* at 41 (quoting 69 Fed. Reg. at 35,234) (internal quotation marks omitted).

III. Analysis and Conclusions: The merits determination is contrary to law.

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.¹⁰ 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.¹¹ In making that assessment, the Authority defers to the arbitrator's underlying factual findings.¹²

The Authority has held that the merit-system principles stated in 5 U.S.C. § 2301 "are hortatory and [are] not self-executing."¹³ Thus, the Arbitrator's finding that the Agency violated § 2301(b)(3) does not independently establish that the Agency violated the law. Similarly, her finding that the Agency violated § 2302(b)(12) requires a finding that the Agency violated a "law, rule, or regulation implementing, or directly concerning, the merit[-]system principles."¹⁴

The Arbitrator concluded that the Agency violated 5 U.S.C. § 9701, 6 U.S.C. § 461, 19 U.S.C. § 267a, and the Notice. With respect to the Notice, the Authority has held that supplementary information published in a Federal Register notice does not carry the force of law.¹⁵ Moreover, there is no support for the Arbitrator's conclusion that the Agency violated any of the statutory provisions.

Title 19, § 267a of the U.S. Code authorizes, but does not require,¹⁶ the establishment of a FLAP for customs officers. Further, other than limiting awards to officers who "make[] substantial use of [one] or more foreign languages in the performance of official duties" and capping awards at five percent of basic pay,¹⁷ § 267a establishes no substantive requirements for the content of FLAPs. Thus, any limits on the Agency's discretion to establish and administer FLAPs are extrinsic to § 267a. Accordingly, the Agency did not violate

§ 267a by limiting FLAP eligibility to CBP Officers represented by NTEU.

Similarly, 5 U.S.C. § 9701 authorizes, but does not require, the Secretary of Homeland Security to establish, by regulation, a separate human-resources-management system for the Department. Although § 9701(b)(3)(A) provides that such a system may "not waive, modify, or otherwise affect . . . the public[-]employment principles of merit . . . including the principle[] of . . . equal pay for equal work," this case does not concern regulations issued pursuant to the Secretary of Homeland Security's authority to create a separate personnel system.¹⁸ Accordingly, the Agency did not violate 5 U.S.C. § 9701 by not making Union-represented employees eligible for FLAP awards.

Finally, 6 U.S.C. § 461 required the Secretary of Homeland Security to submit, to Congress and the President, a plan for eliminating pay disparities within the Department within ninety days of the enactment of the Homeland Security Act of 2002. Because there is no evidence – and the Arbitrator made no finding – that the Department did not submit the plan or that the plan was legally inadequate, the Arbitrator's determination that the Agency violated § 461 is contrary to law.

Based on the forgoing, the Arbitrator's conclusion that the Agency violated a law, rule, or regulation implementing merit-system principles is contrary to law. Accordingly, as the Arbitrator's finding of a contractual violation was based solely on these legal violations, which we set aside, we set the award aside. Because we have set aside the award on the merits, it is unnecessary for us to resolve the Agency's exception that the grievance was not arbitrable.

IV. Decision

We set aside the award.

¹⁰ *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)).

¹¹ *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

¹² *Id.*

¹³ *AFGE, Local 1658*, 61 FLRA 80, 82 (2005) (citing *NFFE, Local 1904*, 56 FLRA 196, 197 (2000)).

¹⁴ 5 U.S.C. § 2302(b)(12).

¹⁵ *U.S. Dep't of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Del.*, 57 FLRA 304, 307 (2001) (Chairman Cabaniss dissenting on other grounds), *enforced*, 316 F.3d 280 (D.C. Cir. 2003).

¹⁶ See *Contreras v. United States*, 64 Fed. Cl. 583 (2005), *aff'd*, 168 F. App'x 938 (Fed. Cir. 2006).

¹⁷ See 19 U.S.C. § 267a (incorporating requirements of 5 U.S.C. ch. 45); 5 U.S.C. § 4523(a).

¹⁸ *Cf. NTEU v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006) (upholding injunction barring implementation of certain rules promulgated pursuant to § 9701(a) for failing to satisfy § 9701(b)(4)'s requirement that personnel system must ensure right to bargain collectively).