

73 FLRA No. 44

LABORERS INTERNATIONAL
UNION OF NORTH AMERICA
LOCAL 1776
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
NATIONAL GUARD BUREAU
MICHIGAN ARMY NATIONAL GUARD
(Agency)

0-AR-5732

DECISION

August 31, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members
(Member Kiko dissenting)

I Statement of the Case

Arbitrator John S. West denied the Union's grievance, which alleged the Agency violated the parties' collective-bargaining agreement and § 7116 of the Federal Service Labor-Management Relations Statute (the Statute) by implementing a new policy requiring the immediate removal of dual-status technicians (technicians) who had lost their military membership due to medical disability. The Union filed exceptions on contrary-to-law, nonfact, essence, and exceeded-authority grounds. Because the Union does not demonstrate that the award is deficient on these grounds, we deny the exceptions.

¹ 32 U.S.C. § 709(b)(2).

² Award at 6 (quoting National Guard Bureau Technician Personnel Regulation 715 (July 13, 2007)).

³ Section 10.2(3) of the parties' agreement states:

II Background and Arbitrator's Award

The Agency employs technicians, who are required to maintain membership in the Michigan National Guard as a condition of their civilian employment.¹ On June 29, 2020, the Agency notified the Union that the Agency had received new regulatory guidance from the National Guard Bureau (bureau) and asked the Union to respond if it wanted to negotiate regarding the new guidance.

The new guidance rescinded a previous bureau regulation that stated, in relevant part, "the one exception to the requirement for prompt termination upon loss of military membership is in pending disability[-]retirement claims. Under these circumstances, a technician who has lost military membership may be retained until the [Office of Personnel Management's (OPM's)] adjudication is received."² The exception in the rescinded regulation is also in Section 10.2(3) of the parties' agreement (Section 10).³

As a result of the new guidance, the Agency issued and implemented a policy memorandum (policy) requiring immediate removal of technicians with pending disability-retirement claims who had lost their military membership due to medical disability. Before the Agency implemented the policy, technicians separated from military service due to disability were permitted to maintain their employment while awaiting OPM's adjudication of their disability-retirement claims. The Agency did not provide the policy to the Union before issuing it to employees.

The Union requested that the Agency rescind the policy. The Union subsequently filed a grievance alleging that the policy conflicts with Section 10 and the Agency failed to bargain before implementing the policy. The parties were unable to resolve the grievance, which advanced to arbitration. The Arbitrator framed the issue as "whether [a] technician can remain employed awaiting OPM disability retirement or not."⁴

Loss of military membership results in separation from technician service after a 30-day notice. However, in accordance with applicable law and government[-]wide regulations, applicants for [National Guard] Special Disability Retirement Provisions may remain working in a technician duty status, or request annual leave, sick leave, or leave without-pay (LWOP) status until receipt of OPM's initial decision on the disability application.

Id. at 28.

⁴ *Id.* at 7-8.

As relevant here, the Arbitrator found that the Agency implemented the policy to comply with 10 U.S.C. § 10216. Section 10216(e)(1) prohibits the Agency from compensating a dual-status technician who fails to maintain military membership. Section 10216(e)(2) provides an exception that allows the Agency to employ a technician for up to twelve months if the Secretary of the Army determines “that such loss of membership was not due to the failure of that individual to meet military standards.”⁵ The Union argued that medical disability met this exception, and therefore the Agency’s refusal to follow Section 10 was an unlawful repudiation of that provision. The Arbitrator rejected this argument, finding that technicians who lost membership due to medical disability failed to meet military standards. The Arbitrator noted that § 10216 specifically carves out an exception for combat-related disabilities⁶ and concluded that, had Congress intended to provide an exception for other medical disabilities, it “could have easily done so.”⁷

On this basis, the Arbitrator concluded that the policy was consistent with 10 U.S.C. § 10216, and the Agency’s implementation of the policy to comply with that statute was not unlawful. Further, because Section 10 must be applied “in accordance with applicable law,” the Arbitrator found no violation of that provision.⁸ Consequently, the Arbitrator denied the grievance.⁹

The Union filed exceptions to the award on May 14, 2021. The Agency filed an opposition to the Union’s exceptions on June 11, 2021.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator failed to find that the Agency repudiated the parties’ agreement. Specifically, citing the Authority’s decision in *U.S. Department of the Army, Fort Campbell District, Third Region, Fort Campbell, Kentucky (Fort Campbell)*, the Union contends that the Agency violated § 7116(a)(1) and (5) of the Statute by implementing a unilateral change pursuant

to new Agency regulations when the parties’ agreement addressed the matter.¹⁰

Generally, an agency violates § 7116(a)(1) and (5) of the Statute¹¹ when it repudiates a provision of a negotiated agreement.¹² However, when such a provision is contrary to law, an agency’s failure to comply with that provision does not constitute an unlawful repudiation.¹³

The Union’s reliance on *Fort Campbell* is misplaced. In *Fort Campbell*, the Authority held that “collective[-]bargaining agreements, and not agency rules and regulations, govern the disposition of matters to which they both apply when there is a conflict between the agreement and the rule or regulation.”¹⁴

⁵ *Id.* at 29 (quoting 10 U.S.C. § 10216(e)(2)).

⁶ *Id.* at 30-31 (quoting 10 U.S.C. § 10216(g)(1)).

⁷ *Id.* at 33.

⁸ *Id.* at 34; *see also id.* at 28.

⁹ *Id.* at 34. The Arbitrator also noted that the Union did not request, and maintained that it could not have engaged in, impact and implementation bargaining because its request was for rescission of the policy and status-quo-ante relief. *Id.* at 33.

¹⁰ Exceptions at 4-5 (arguing that “collective[-]bargaining agreements, and not agency rules and regulations, govern the disposition of matters to which they both apply when there is a conflict between the agreement and the rule or regulation.”

(quoting *U.S. Dep’t of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 194 (1990) (*Fort Campbell*)).

¹¹ 5 U.S.C. § 7116(a)(1), (5).

¹² *U.S. DOJ, Fed. BOP*, 68 FLRA 786, 788 (2015) (Member Pizzella dissenting in part) (citing *Dep’t of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858, 861 (1996)).

¹³ *NTEU*, 72 FLRA 537, 539 (2021) (Chairman DuBester concurring) (citing *Off. of the Adjutant Gen., Mo. Nat’l Guard, Jefferson City, Mo.*, 58 FLRA 418, 421 (2003)).

¹⁴ *Fort Campbell*, 37 FLRA at 194.

Unlike in that case, the Arbitrator found that, although the Agency reexamined its practices under the law after a change in bureau regulations interpreting 10 U.S.C. § 10216, it was the law – not the changed regulation – that provided the basis for the change in existing practice.¹⁵ As noted above, the enforcement of statutory laws – even when they conflict with collective-bargaining agreements – does not violate the Statute.¹⁶ Therefore, the Arbitrator’s conclusion that the Agency did not repudiate the parties’ agreement by implementing the policy is consistent with Authority precedent.¹⁷

Accordingly, we find that the award is not contrary to law and deny the Union’s exception.¹⁸

B. The award is not based on a nonfact.

The Union contends that the award is based on a nonfact because the Arbitrator concluded that the Agency’s action was “in accordance with the law” and Section 10.¹⁹ To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which

the arbitrator would have reached a different result.²⁰ However, neither legal conclusions nor conclusions based on the interpretation of a collective-bargaining agreement may be challenged as nonfacts.²¹ Because the Union’s exception challenges the Arbitrator’s legal conclusions and contractual interpretation, we deny this exception.

C. The Union’s exceeded-authority exception fails to establish that the award is deficient.

The Union claims that the award is deficient because the Arbitrator did not resolve the issue submitted to arbitration.²² As relevant here, arbitrators exceed their authority by failing to resolve an issue submitted to arbitration.²³ Specifically, the Union argues that it is unclear what issue the award resolved, because it did not address the Union’s “original complaint” that the Agency’s implementation of the policy memo was a “unilateral change and . . . goes against the [parties’ agreement].”²⁴ However, the Arbitrator addressed this issue by concluding that the Agency lawfully issued the policy to comply with 10 U.S.C.

¹⁵ Award at 33-34. The Union argues that the parties stipulated that the policy was based on a change in Agency regulations and not a change in the law. Exceptions at 4-5 (citing Exceptions, Attach. 1, Stipulation of Facts (Stipulation)). Contrary to the Union’s argument, the record does not demonstrate that the Agency stipulated that it issued the policy because the revised regulation required it to do so. Rather, the stipulation merely shows that the Agency, in issuing its memorandum announcing its implementation of the policy change, referenced the Agency regulation. Stipulation at 3. This reference, standing alone, does not demonstrate that the Arbitrator’s conclusion – which was based on the entire record of the case – is contrary to law.

¹⁶ See *NTEU*, 72 FLRA at 539; see also *U.S. Dep’t of VA*, 72 FLRA 287, 289-90 (2021) (VA) (Member Abbott concurring) (explaining that the prohibition in § 7116(a)(7) of the Statute that prevents an agency from enforcing rules and regulations that “conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed” does not apply to statutes); *U.S. Dep’t of Energy, Wash., D.C.*, 34 FLRA 361, 366 (1990) (*Energy*) (as provision allegedly violated by respondent was inconsistent with law, the respondent did not violate the Statute by failing to adhere to it).

¹⁷ E.g., *VA*, 72 FLRA at 289-90; see also *GSA, Wash., D.C.*, 50 FLRA 136, 139 (1995) (citing *Energy*, 34 FLRA at 366) (agency’s refusal to honor a contract provision that conflicted with federal law was not unlawful repudiation).

¹⁸ The Union bases its essence exception on the same argument. Exceptions at 10. For the same reasons we deny the contrary-to-law exception, we also deny the Union’s essence exception. *U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Va.*, 72 FLRA 477, 480 n.30 (2021) (*BOP*) (Chairman DuBester concurring; Member Abbott concurring) (citing *U.S. DHS, U.S. CBP, Savannah, Ga.*, 68 FLRA 319, 322-23 (2015); *NFFE, Loc. 376*, 67 FLRA 134, 136 (2013)).

¹⁹ Exceptions at 6 (quoting Award at 34 (“the Agency’s position does not appear to be unlawful, rather it appears to be [in] accordance with the law and [Section 10] specifies that the provision is to be read ‘. . . in accordance with applicable law . . .’”).

²⁰ *U.S. Dep’t of VA, Nashville Reg’l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (Member Abbott concurring) (citing *AFGE, Loc. 1594*, 71 FLRA 878, 880 (2020) (*Local 1594*)).

²¹ *U.S. Dep’t of VA*, 72 FLRA 518, 520 (2021) (Chairman DuBester concurring) (holding that legal conclusions are not challengeable as nonfacts); *U.S. Dep’t of HHS, Off. of Medicare Hearings & Appeals*, 71 FLRA 677, 679 (2020) (Member Abbott concurring; Chairman Kiko dissenting on other grounds) (holding that contractual interpretations are not challengeable as nonfacts (citing *U.S. Dep’t of State, Passport Servs.*, 71 FLRA 12, 13 (2019); *U.S. Dep’t of VA, VA Reg’l Off., St. Petersburg, Fla.*, 70 FLRA 799, 801 (2018))).

²² Exceptions at 12. The Union also repeats the same argument it made in support of its contrary-to-law exception – that the award is deficient because the parties stipulated that the policy was based on a change in the Agency’s regulations and not a change in the law – to support its exceeded-authority exception. *Id.* For the same reasons we rejected that argument in resolving the contrary-to-law exception, we also reject it here. *BOP*, 72 FLRA at 480 n.30.

²³ *Local 1594*, 71 FLRA at 879 (citing *AFGE, Loc. 3254*, 70 FLRA 577, 578 (2018)).

²⁴ Exceptions at 12.

§ 10216, and thus, did not violate the parties' agreement.²⁵
Therefore, we deny this exception.

IV. Decision

We deny the Union's exceptions.

²⁵ Award at 34.

Member Kiko, dissenting:

For the reasons set forth in my dissenting opinion in *U.S. DOD, Ohio National Guard (DOD)*¹ and the Authority's decision in *National Guard Bureau, Air National Guard Readiness Center*,² I would find that the Authority lacks jurisdiction over the Michigan Army National Guard. Briefly stated, the Michigan Army National Guard is not an "agency" under § 7103(a)(3) of the Federal Service Labor-Management Relations Statute (the Statute).³ And "state sovereign immunity bars a federal administrative body from adjudicating complaints filed by a private party against a nonconsenting State."⁴

I recognize that the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) recently disagreed with my assessment when it denied a petition for review of *DOD*.⁵ But I note that the Authority has previously adhered to a well-considered position even when the U.S. Court of Appeals with jurisdiction over a case had rejected that position in an earlier dispute.⁶ Despite my respect for the Sixth Circuit's contrary view, I remain convinced that we do not have jurisdiction over the Michigan Army National Guard.

Accordingly, I would dismiss this case for lack of jurisdiction.

¹ 71 FLRA 829, 833-35 (2020) (Dissenting Opinion of Chairman Kiko) (Member Abbott concurring in part), *pet. for review denied, Ohio Adjutant Gen.'s Dep't v. FLRA*, 21 F.4th 401, 409 (6th Cir. 2021) (*Ohio Adjutant Gen.'s Dep't*).

² 72 FLRA 350 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part).

³ 5 U.S.C. § 7103(a)(3); *DOD*, 71 FLRA at 833-34; *see also id.* at 834 (noting that the "Supreme Court has consistently struck down 'federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes'" (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012))).

⁴ *DOD*, 71 FLRA at 834 (quoting *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002)).

⁵ *Ohio Adjutant Gen.'s Dep't*, 21 F.4th at 407-09.

⁶ *Compare Luke Air Force Base, Ariz. v. FLRA*, 208 F.3d 221 (9th Cir. 1999) (table decision without published opinion), *rev'g Luke Air Force Base, Ariz.*, 54 FLRA 716, 730-32 (1998) (finding a formal equal-employment-opportunity (EEO) complaint was a "grievance" under § 7114(a)(2)(A) of the Statute), *with U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 845, 848-49 (2010) (Member Beck dissenting) (in a case arising within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), holding that a formal EEO complaint was a "grievance" under § 7114(a)(2)(4), while acknowledging that the Ninth Circuit disagreed).