73 FLRA No. 79

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 407
(Union)

0-AR-5765

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DECISION

January 18, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Kathleen Jones Spilker issued an award finding the Agency violated the parties' agreement by failing to: notify the Union of a personnel survey; provide the Union the results of the survey; and give the Union notice and an opportunity to bargain over certain aspects of changes to employees' duty stations. The Agency excepted, arguing the award is based on a nonfact and is contrary to law. For the reasons discussed below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

On May 29, 2020 – after reviewing employees' duty stations – the Agency sent the Union a "courtesy memo" notifying it "of changes necessary to correct administrative errors for [certain employees] who ha[d] an incorrect duty station documented in the Federal Personnel and Payroll System."[1] The Agency stated that the changes to those employees' duty stations were effective February 16, 2020. The Union grieved, and the matter went to arbitration.

Article 3 of the parties' agreement pertinently provides:

> A. In all matters relating to personnel policies, practices and other conditions of employment, the parties will have due regard for the obligations imposed by [the Federal Service Labor-Management Relations Statute (Statute)] and this Agreement.
>
> E. The [Agency] will provide the Union with reasonable advance written notice of personnel surveys concerning conditions of employment that involve bargaining[-]unit employees when such surveys are proposed by or known to [the Agency]. The [Agency] will also provide the Union . . . with an advance written copy of survey results when available to the [Agency].[2]

As relevant here, the Arbitrator found the Agency conducted a personnel survey and violated Article 3.E by failing to give the Union advance notice of, and a written copy of the results of, the survey.

In addition, the Arbitrator found the Agency violated Article 3.A by failing to bargain with the Union regarding the changes to employees' duty locations. The Arbitrator noted that the "grievance [did] not challenge the Agency's right to determine duty assignments" and merely "raise[d] issues regarding *implementation of the process* whereby the Agency made these decisions."[3] Relatedly, the Arbitrator found "no dispute that the Agency has the sole right to determine duty locations,"[4] as "recognized in [Article 2.A.2] of the [parties' a]greement and . . . § 7106(a) [of the Statute,] and [that] it is not subject to arbitration."[5] Nevertheless, the Arbitrator found that "[b]ecause the personnel survey and resulting reassignments impacted conditions of employment, the Agency was required to provide the Union with reasonable advance written notice and the opportunity to bargain over the proposed changes."[6]

[1] Exceptions, Attach. 3, May 29, 2020 Memorandum at 1.
[2] Award at 2-3.
[3] *Id.* at 14 (emphasis added).
[4] *Id.* at 13; *see also id.* at 17 (finding "[t]he Agency has the sole authority to determine employee work locations, following the regulations set forth in 5 [C.F.R. § 5]31.605(a)").
[5] *Id.* at 13; *see also id.* at 7 (noting the Union's argument that § 7106 of the Statute and Article 2 of the agreement "allow for negotiations between the parties regarding the *procedures* that will be followed in making these assessments," that "the parties should meet and formulate a *procedure* to be followed in the assignment of duty stations, and . . . that such negotiations in no way infringe on [m]anagement's rights under the [S]tatute or the [a]greement" (emphasis added)).
[6] *Id.* at 15.

As remedies, the Arbitrator directed the Agency to conduct a new survey to determine employees' correct duty stations and to give the Union advance notice of the survey and a written copy of the survey results. The Arbitrator stated that "[t]he Agency is not contractually obligated to receive input from the Union for the survey, but such input might well facilitate the process."[7] The Arbitrator also directed the Agency "to bargain with the Union regarding any changes to duty locations that result from the survey."[8]

The Agency filed exceptions to the award on September 20, 2021, and the Union filed an opposition to the Agency's exceptions on October 18, 2021.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

According to the Agency, the Arbitrator's finding that it conducted a personnel survey is a nonfact.[9] 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.[10] The Authority will not find an award deficient on nonfact grounds based on a party's disagreement with an arbitrator's evaluation of the evidence, including the weight to be accorded such evidence,[11] or the arbitrator's interpretation of a collective-bargaining agreement.[12]

The Agency argues that it never conducted a personnel survey, and instead merely "corrected administrative errors to certain employees' duty stations."[13] However, the Arbitrator's contrary finding was based on: (1) testimony from the Agency's "Administration Officer" that "in conjunction with the *survey*, the Human Resources Specialist . . . printed out a list of all employees' duty stations, which was reviewed to determine if they were correctly assigned";[14] and (2) the Arbitrator's interpretation of the term "personnel survey" from Article 3.E of the parties' agreement.[15] The Agency's nonfact argument challenges the Arbitrator's evaluation of the evidence and interpretation of the parties' agreement. As such, the argument does not demonstrate that the award is based on a nonfact, and we deny this exception.

B. The award is not contrary to law.

The Agency argues that the award is contrary to law in certain respects.[16] In resolving a contrary-to-law exception, the Authority reviews any question of law raised by an exception and the award de novo.[17] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[18] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[19] However, exceptions that are based on misunderstandings of an arbitrator's award do not show that an award is contrary to law.[20]

According to the Agency, the award conflicts with § 7106(a) of the Statute because it "orders the Agency to *bargain with the Union over duty*[-]*station locations*," which involves "rights reserved to management."[21] The Agency also argues the award is contrary to 5 C.F.R.

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[7] *Id.* at 16.
[8] *Id.*
[9] Exceptions at 9.
[10] *NTEU, Chapter 298*, 73 FLRA 350, 351 (2022) (citing *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (*VA*) (Member Abbott concurring); *AFGE, Loc. 1594*, 71 FLRA 878, 880 (2020)).
[11] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 70 (2022) (Member Kiko concurring) (citing *Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*, 72 FLRA 694, 696 (2022)).
[12] *Id.* (citing *Fed. Educ. Ass'n, Stateside Region*, 72 FLRA 724, 725 (2022); *SSA*, 71 FLRA 580, 582 n.22 (2020) (Member DuBester concurring); *NTEU*, 69 FLRA 614, 619 (2016)).
[13] Exceptions at 9.
[14] Award at 5 (emphasis added).
[15] *Id.* at 7-8.
[16] Exceptions at 4-8.
[17] *AFGE, Loc. 3254*, 73 FLRA 325, 326 (2022) (citing *AFGE, Loc. 3954*, 73 FLRA 39, 42 (2022)).
[18] *Id.*
[19] *Id.*
[20] *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 220, 221 (2022) (*Nat'l Park Serv.*) (citing *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 73 (2014) (Member Pizzella dissenting on other grounds); *SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012)).
[21] Exceptions at 7 (emphasis added).

§§ 531.604(b)(1)[22] and 531.605(a)[23] because it "directs management to bargain with the Union over matters which are the subject of" those regulations, which provide that the Agency determines duty-station assignments.[24] Similarly, the Agency argues the award is contrary to § 7117(a) of the Statute because the award – requiring the Agency to bargain over the location of duty stations – conflicts with 5 C.F.R. §§ 531.604(b)(1) and 531.605.[25] As such, all of the Agency's contrary-to-law arguments are premised on its belief that the award requires it to bargain with the Union over duty-station assignments.

The Arbitrator directed the Agency to bargain over "any changes to duty locations that result from the survey."[26] Reading that statement in the context of the Arbitrator's other statements, we find that this direction was limited to the impact and implementation of changes to the assignments – not the assignments themselves.[27] Thus, the Agency's contrary-to-law exceptions are based on a misunderstanding or mischaracterization of the award. As such, they do not demonstrate that the award is deficient, and we deny them.[28]

IV. Decision

We deny the Agency's exceptions.

[22] Section 531.604(b)(1) provides "[a]n agency determines an employee's locality rate by [d]etermining the employee's official worksite consistent with the rules in § 531.605." 5 C.F.R. § 531.604(b)(1).

[23] Section 531.605(a) provides:

> (1) Except as otherwise provided in this section, the official worksite is the location of an employee's position of record where the employee regularly performs his or her duties.
>
> (2) If the employee's work involves recurring travel or the employee's work location varies on a recurring basis, the official worksite is the location where the work activities of the employee's position of record are based, as determined by the employing agency, subject to the requirement that the official worksite must be in a locality pay area in which the employee regularly performs work.
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> (3) An agency must document an employee's official worksite on an employee's Notification of Personnel Action (Standard Form 50 or equivalent).

5 C.F.R. § 531.605(a).

[24] Exceptions at 6.

[25] *Id.* at 6-7. The Union argues that the Agency's § 7117(a) argument is not properly before us because the Agency failed to raise it at arbitration. *See* Opp'n Br. at 8. Because the Agency's § 7117(a) argument lacks merit for the reasons discussed below, we assume, without deciding, that the argument is properly before us. *See, e.g.*, *U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr.*, 69 FLRA 599, 600 (2016) (Member Pizzella dissenting on other grounds).

[26] Award at 16.

[27] *See, e.g.*, *Nat'l Park Serv.*, 73 FLRA at 221 (Authority "read[] the [a]rbitrator's [challenged] statement in context" to deny exception); *AFGE, Loc. 3294*, 70 FLRA 432, 436 n.42 (2018) (Member DuBester concurring) (Authority relied on "the most reasonable reading of the award" to deny exception).

[28] *NTEU*, 73 FLRA 315, 320 (2022) (Chairman DuBester concurring) (denying an exception based on a misunderstanding of the award); *U.S. DHS, U.S. CBP*, 71 FLRA 243, 245 (2019) (Member Abbott concurring) (denying contrary-to-law exception because the agency misconstrued the award).