

63 FLRA No. 128

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
WASHINGTON, D.C.
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4114

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DECISION

June 5, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This case is before the Authority on exceptions to an award of Arbitrator M. David Vaughn filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition.

The grievance alleged that the Agency violated Article 37 of the parties' collective bargaining agreement (agreement) and § 7116(a)(1) and (5) of the Statute by failing to bargain with the Union over the impact and implementation of directed reassignments of unit employees to supervisory positions. The Arbitrator sustained the grievance. For the following reasons, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency directed the reassignment of several Field National Import Specialists (FNIS), bargaining unit employees, to Supervisory Import Specialist (SIS) positions. The Union filed a grievance alleging that the Agency violated the agreement and § 7116(a)(1) and (5) of the Statute by implementing those reassignments without providing the Union with notice and an opportunity to bargain. The Agency denied the grievance and the Union submitted it to arbitration.

The parties stipulated to the issue as follows:¹

Did the Agency violate the National Agreement and the Federal Service Labor-Management Relations Statute, as alleged in the grievance . . . , when it effected the directed reassignment of Field National Import Specialists into Supervisory Import Specialist positions without providing the Union advance notice and an opportunity to bargain? If so, what shall the remedy be?

Award at 2.

The Arbitrator first addressed whether the directed reassignments constituted a change in the FSNIS' conditions of employment that was more than *de minimis* in order to determine whether the Agency had an obligation to bargain over the impact and implementation of the assignments. In this regard, the Arbitrator found that employees who are reassigned out of the bargaining unit "necessarily experience[] changes in such important matters as policies regarding assignment of overtime, and participation in various quality of worklife programs, such as flexitime and flexiplace[,] as well as "los[s] [of] access to the negotiated procedures governing grievances." *Id.* at 10. The Arbitrator concluded that these changes were "clearly more than *de minimis*." *Id.* Consequently, he found that the impact and implementation of the directed assignments "is presumptively subject to bargaining." *Id.* at 11.

The Arbitrator next addressed whether there were other grounds for concluding that the Agency did not have an obligation to bargain, specifically, negotiability issues and issues concerning whether the matter is covered by the parties' agreement. As to the former, the Arbitrator found that "[t]he record contains no specific bargaining proposals" and he refused to "speculate on what proposals the Union might have made" if it had been given the opportunity to bargain. *Id.* He also found that the Union was neither attempting to bargain over the substance of the decision to effect the directed reassignments, nor seeking "to negotiate the procedures used by the Agency in filling non-unit positions (supervisory or otherwise), or the conditions of employment of those positions." *Id.* According to the Arbitrator, the Union was seeking "only to negotiate over the procedures for the exercise of management's right to assign employees insofar as the directed reassignments at issue . . . affect unit employees, and over appropriate arrangements for unit employees adversely affected by such reassignments." *Id.* In this regard, he stated that "[t]he

1. In a preliminary proceeding, the Arbitrator considered and rejected the Agency's claim that the grievance was not arbitrable. As no exceptions were filed with respect to that determination, it will not be addressed further.

question of the negotiability of any specific Union proposals is not dispositive of the question of the Agency's presumptive obligation to engage the Union in impact and implementation bargaining." *Id.* at 12.

Applying the Authority's test for determining whether a matter is covered by an agreement, *see United States Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993) (*SSA*), the Arbitrator found that the directed reassignments at issue were not a matter that was expressly covered by Article 20 of the parties' agreement (Article 20).² He also found that matters related to the impact and implementation of directed reassignments to supervisory positions are not inseparably bound up with the language of Article 20. In this regard, he found that although nothing in Article 20 spe-

cifically referenced bargaining unit positions, the policies and procedures set forth therein only made sense if they were understood as applying to bargaining unit positions. He noted, for example, that the procedures for voluntary and hardship reassignments in Article 20, Sections 4.A. and 4.B., and reassignments of employees to identical positions at other posts of duty due to workload fluctuations in Article 20, Section 5, "must, of necessity, apply solely to . . . bargaining unit positions" because the parties "may not, under statutory and case law, negotiate procedures for filling non-unit positions." *Id.* at 13. He also found it "unlikely" that Section 4.F. was intended to extend to reassignments outside the unit when the sections on either side did not cover such actions. *Id.* He noted as well that testimony established that the provision regarding directed reassignments had never been used as the basis for reassignments to supervisory positions.

Based on the foregoing, the Arbitrator concluded that the Agency violated both the parties' agreement and the Statute when it failed to notify the Union of the directed reassignments and offer it an opportunity to bargain over the impact and implementation of those reassignments. Therefore, the Arbitrator sustained the grievance and, as a remedy, directed the Agency to bargain with the Union on proposals that address procedures for directing reassignments to positions outside the unit and appropriate arrangements for employees subject to those reassignments.³ He stated that, under his order, the Agency is not obligated "to negotiate with respect to proposals that address bargaining unit employees who are not reassigned and who remain in the unit." *Id.* at 17. He also directed the Agency to post an appropriate notice "in all locations where bargaining unit employees work stating that it failed to notify the Union of the directed reassignments or offer an opportunity to bargain with respect to the impact and implementation of those reassignments." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to law in four respects. First, the Agency maintains that

3. Citing *Federal Correctional Institution*, 8 FLRA 604 (1982), the Arbitrator rejected the Union's request for a *status quo ante* remedy. As the Union did not except to this conclusion, we do not address it here. In addition, finding that the Union had not presented any evidence demonstrating that any of the affected FNISs had lost any pay, allowances or benefits as a result of the directed reassignments, the Arbitrator did not order a make whole remedy under the Back Pay Act. The Union also does not except to that determination and we do not address it further.

2. Relevant portions of Article 20, entitled "Assignment of Work," provide:

Section 4. The employer retains the legal right to fill positions through competitive promotion procedures . . . and through alternate staffing methods (including reassignment) . . .

A. Employee voluntary reassignment requests: Consideration will be given to a written request for reassignment initiated by an employee. . . .

B. Employee hardship reassignment requests: Consideration will be given to the needs and circumstances of individual employees (e.g., employee or immediate family health problems of a serious nature). . . .

. . . .

F. Directed reassignments: The Employer retains the right to identify and direct the reassignment of an Employee based on the needs of the Service, including but not limited to the following:

(1) for deficiencies in an employee's work performance which may be

corrected or minimized in a different work location; or

(2) for remediation reasons.

When such reassignments are made for remediation reasons, the provisions of Article 28 will govern.

Section 5. In those circumstances where:

A. the Employer determines it is necessary to reassign . . . one or more employees at one post of duty to an identical position(s) at another post of duty . . . ; and

B. the Employer determines that more than one (1) employee is equally qualified from within the work group from which the assignment is to be made, the following method will be used to identify the employee(s):

(1) volunteers for reassignment will be sought

(2) if more equally qualified employees volunteer than are required, selections will be made in order of the greatest amount of Customs service . . . ;or

(3) if too few equally qualified employees volunteer, employees will be selected in inverse order of Customs service

Attachment 6 to Union's Opposition.

the Arbitrator's conclusion that the subject matter of the grievance concerns the conditions of employment of bargaining unit employees is contrary to law. The Agency notes in this regard that the Arbitrator stated that "the reassignment of unit employees in this case constituted a change in their conditions of employment even though the employees did not experience a change in grade, pay, promotion potential, or duty station." Exceptions at 11. Citing the test for determining whether a matter pertains to unit employees' conditions of employment set forth in *Antilles Consolidated Education Association*, 22 FLRA 235 (1986) (*Antilles*), the Agency asserts that "a proposal that is principally focused on nonbargaining unit positions or employees does not directly affect the work situation or employment relationship of bargaining unit employees." *Id.* According to the Agency, because the Arbitrator found that the subject matter of the grievance concerned unit employees' conditions of employment, his award is contrary to law.

Second, the Agency contends that the award is contrary to law because it requires the Agency to negotiate over appropriate arrangements for employees outside the bargaining unit. According to the Agency, the SIS positions to which the FNISs were reassigned are supervisory positions and, after the FNISs occupied those positions, they were no longer "employees" within the meaning of the Statute and not represented by the Union. Citing Authority precedent, the Agency maintains that matters pertaining to supervisory positions do not involve the conditions of employment of bargaining unit employees and are therefore outside the Agency's duty to bargain. Exceptions at 5 (citing, among other cases, *NAGE, Local R1-109*, 61 FLRA 588, 590 (2006); *AFGE, Local 12*, 60 FLRA 533, 538 (2004)). The Agency asserts that because the award requires it to bargain over appropriate arrangements "for employees who have been reassigned into supervisory positions," it requires bargaining over matters that are outside the scope of its duty to bargain and thus is contrary to law. Exceptions at 5.

Third, the Agency contends that the award is contrary to law because it requires it to bargain over procedures for filling supervisory positions. In this regard, the Agency asserts that the Arbitrator's award is "internally inconsistent." *Id.* at 7. Specifically, according to the Agency, the Arbitrator stated that, under the Statute, the parties are not required to bargain on procedures for filling non-unit positions and found that the Union is not attempting to bargain over such matters, but, at the same time, the Arbitrator required such bargaining.

Fourth, and finally, the Agency asserts that the award is contrary to law because the Arbitrator erred in finding that the subject matter is not covered by the parties' agreement. In this regard, the Agency maintains that the Arbitrator's interpretation of the agreement is not subject to deference, but is subject to *de novo* review. The Agency argues that the Arbitrator erred in interpreting Article 20 because he gave it a meaning "other than its plain, clear, and unequivocal meaning." *Id.* at 9. Referencing Section 4.F., the Agency notes that the section specifically allows the Agency to direct the reassignment of employees based on its determination of its needs. Based on the fact that Section 4.F. applies to directed reassignments, the Agency cites to case precedent in which it claims that the Authority has found that a matter is covered by an agreement where the agreement provides for the matter in general or broad terms, and argues that this precedent supports its exception. The Agency cites *United States Dep't of the Treasury, IRS, Denver, Colo.*, 60 FLRA 572, 574 (2005); *PASS*, 56 FLRA 798, 804 (2000) (*PASS*); *United States Dep't of Agriculture, Forest Service, Pacific Northwest Region, Portland, Ore.*, 48 FLRA 857, 860-61 (1993); and *Sacramento Air Logistics Ctr, McClellan AFB, Calif.*, 47 FLRA 1161, 1165-66 (1993). The Agency claims that "there is no logical basis for concluding that an Agency's decision to reassign an employee is not covered by an [a]greement provision which sets forth the procedures for reassigning employees." Exceptions at 10.

B. Union's Opposition

According to the Union, the Agency's exceptions are "based . . . on a mischaracterization of the Arbitrator's decision." Opposition at 7. The Union asserts that "the Arbitrator correctly found that the directed reassignments of employees out of the bargaining unit into supervisory positions changed their conditions of employment." *Id.* at 20. In this regard, the Union notes the Arbitrator's finding that reassignment out of the unit affected the employees reassigned by changing, among other things, the overtime policies to which they were subject, their ability to participate in flexiplace and flexitime programs, and their access to the negotiated grievance procedure. The Union emphasizes that the Arbitrator made clear that his holding only applied to the effect of the reassignments on unit employees insofar as they were in the unit, prior to the effectuation of the reassignments.

In addition, the Union states that "the Arbitrator made clear that neither he nor [the Union] was seeking to require the Agency to negotiate appropriate arrangements for non-bargaining unit employees." *Id.* Rather,

the Union asserts, the award recognizes that the Union “had the right, as the exclusive representative, to be given notice and the opportunity to negotiate over the impact and implementation of *the Agency’s decision to reassign employees* out of the bargaining unit, *prior* to the implementation of the decision and therefore while the employees were still bargaining unit employees.” *Id.* at 8 (emphasis in original). Further, the Union argues that the Arbitrator’s remedy “merely reflects that the employees would have still been bargaining unit employees if the Agency had negotiated *prior* to implementation as required by the contract and the Statute.” *Id.* at n.6 (emphasis in original).

Similarly, according to the Union, the Arbitrator did not require the Agency to negotiate procedures for filling supervisory positions. Rather, the Union maintains, the Arbitrator directed the Agency to bargain on proposals that address procedures for directing reassignments of bargaining unit employees to positions outside the bargaining unit.

As to the Agency’s “covered by” exception, the Union notes that the parties’ agreement has expired and argues that the agreement cannot, therefore, serve as the basis for a defense to a charge that it violated its duty to bargain. In this regard, according to the Union, “the Authority’s covered by doctrine has always *required* an existing collective bargaining agreement.” *Id.* at 12 (emphasis in original). In this regard, the Union cites *PASS; United States Patent and Trademark Office*, 57 FLRA 185 (2001); *United States INS, United States Border Patrol, Del Rio, Tex.*, 51 FLRA 768 (1996). The Union also cites *United States Border Patrol, Livermore Sector, Dublin, California*, 58 FLRA 231 (2002), in which, the Union asserts, the Authority “departed from this settled . . . precedent without discussion or without acknowledging its departure.” *Id.* at 12. The Union contends that, if the Authority believes that the covered by defense extends to matters in an expired agreement, it must “state so directly and explain” its change of position. *Id.* at 13.

If the “covered by” defense applies, then the Union claims that the Arbitrator correctly determined that the subject matter of the grievance was not covered by the parties’ agreement. The Union notes that the Arbitrator made that determination based upon his reading of Article 20 and the parties’ past practice. According to the Union, the Agency does not dispute that the Arbitrator applied the correct legal standards in reaching his conclusion, but challenges instead the Arbitrator’s interpretation of the agreement. The Union asserts that, in an arbitration context, an arbitrator’s interpretation of an agreement is not subject to review.

IV. Analysis and Conclusions

The Agency’s exceptions allege that the Arbitrator’s award is contrary to law on several grounds. The Authority reviews questions of law raised as exceptions to an arbitrator’s award *de novo*. See *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority determines whether the award is consistent with the applicable standard of law. See *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making this determination, the Authority defers to an arbitrator’s underlying factual findings. See *id.*

It is well-settled that, under § 7116(a)(1) and (5) of the Statute, prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative notice of and an opportunity to bargain over those aspects of the change that are within the duty to bargain. See, e.g., *NTEU, Chapter 143*, 60 FLRA 922, 927 (2005) (citing *Fed. Bureau of Prisons, Fed. Correctional Institution, Bastrop, Tex.*, 55 FLRA 848, 852 (1999) (*FCI, Bastrop*)). Moreover, with limited exceptions not relevant here, “parties must satisfy their mutual obligation to bargain before changes in conditions of employment are implemented.” *Id.* Even where the substance of the change is not itself subject to bargaining, if the effect of the change is more than *de minimis*, and the agency fails to provide notice of that change and an opportunity to bargain over the impact and implementation of the change, then the agency will be found to have violated § 7116(a)(1) and (5). See, e.g., *FCI, Bastrop*, 55 FLRA at 852.

It is undisputed that the Agency failed to provide notice and an opportunity to bargain to the Union before it implemented the directed reassignments. The Agency claims that it did not have a duty to bargain with the Union because: (1) the reassignments did not relate to the conditions of employment of bargaining unit employees; and/or (2) the subject matter of the reassignments was covered by the parties’ expired agreement.

A. The award is not deficient because it does concern the conditions of employment of supervisors and other nonunit personnel.

The Agency’s claims, that the Arbitrator’s award requires it to bargain over the conditions of employment of supervisory positions, as well as procedures and appropriate arrangements for filling those positions, misconstrue the nature of the Arbitrator’s award. In this regard, the Arbitrator found only that the directed reassignments affected the conditions of employment of bargaining unit employees by depriving them of policies

and practices that are applicable to them solely because they are members of the unit. The Agency does not dispute that finding. Moreover, the Agency's citation of the *Antilles* test for the proposition that proposals pertaining to the conditions of employment of supervisory and other nonunit personnel are outside the duty to bargain is inapposite. The Arbitrator specifically found, and the Agency does not dispute, that the Union made no proposals in this case and the Arbitrator refused to speculate as to the matters that the Union could propose in the circumstances of this case. Finally, the Agency fails to demonstrate that there are no matters concerning the conditions of employment of the reassigned employees prior to the reassignment about which the Union could bargain.⁴ Consequently, the Agency's exception fails to demonstrate that the Arbitrator erred as a matter of law in concluding that the Agency was obligated to bargain over the conditions of employment of the reassigned employees insofar as those matters pertained to their unit status prior to the directed reassignments.

Because the Agency's exceptions concerning procedures and appropriate arrangements are based on the same erroneous claim that the award pertains to the conditions of employment of non-unit employees, for the reasons set forth above, the exceptions fail to establish that the award is deficient. The Arbitrator specifically found that the Union was not attempting to bargain over the conditions of employment of supervisory positions and the Agency has failed to demonstrate that the Arbitrator's finding is contrary to law. Accordingly, we deny the Agency's exceptions.

B. The reassignments were not covered by the parties' agreement.

In assessing whether a matter is "covered by" a collective bargaining agreement, the Authority applies a two-pronged test. Under the first prong, the Authority assesses whether the subject matter is "expressly contained in" the collective bargaining agreement. *United States Dep't of Health & Human Servs, SSA, Balt., Md.* 47 FLRA 1004, 1018 (1993). "[E]xact congruence of language" is not required. *Id.* Instead, "if a reasonable

reader would conclude that the provision settles the matter in dispute[.]" then the subject matter is covered by the agreement. *Id.* If the subject matter is not expressly contained in the agreement, then the Authority applies the second prong of the analysis. Under the second prong, the Authority determines whether the matter is "inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract." *Id.* That analysis considers the parties' intent and bargaining history. *See United States Customs Serv., Customs Mgt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). Moreover, "whether a subject is 'covered by' an existing agreement is a question of law[.]" and not a matter of deferral to an arbitrator's interpretation of that agreement. *See NTEU v. FLRA*, 452 F.3d 793, 797 (D.C. Cir. 2006).

Applying the *SSA* test, the Arbitrator found that the matter of directed reassignments to supervisory positions was not expressly contained in Article 20 of the agreement and that matters related to the impact and implementation of directed reassignments were not inseparably bound up with the language of Article 20. Specifically, he concluded that the provision applied only to reassignments from one unit position to another. In this regard, he based his conclusion on his finding that other provisions of Article 20 relating to reassignments applied solely to bargaining unit positions. He also noted that: (1) the parties are not obligated to bargain on matters pertaining to non-unit positions; and (2) testimony at the hearing established that Section 4.F. had never been applied to directed reassignments to supervisory positions.

The Agency's claim that the Arbitrator's interpretation of Article 20 is contrary to the plain meaning of that provision does not demonstrate that he erred in his interpretation. In particular, the Agency does not establish that the provision applies specifically to reassignments to supervisory positions. In this regard, Section 4.F. does not, and the other provisions of Article 20 pertaining to reassignments do not, expressly relate to reassignments to supervisory positions. *See Dep't of the Treasury, IRS, Kansas City Serv. Ctr., Kansas City, Mo.*, 57 FLRA 126, 129 (2001) (comparison of contract provisions supports conclusion that subject matter is not covered by agreement). Moreover, the Agency does not dispute the Arbitrator's finding that, given the limitations on bargaining over procedures for assigning employees to supervisory positions, and in light of the fact that Section 4.F. had never been applied to those reassignments, the parties did not intend the provisions of Article 20 to apply to reassignments to supervisory positions. *See United States Dep't of the Treasury, IRS,*

4. We note that, at a minimum, the Union could have negotiated a requirement that the Agency notify employees that they were going to be reassigned prior to effectuating the reassignments. *See, e.g., NFFE, Forest Service Council*, 45 FLRA 242, 249-50 (1992). Other possible subjects include procedures and arrangements for closing out an employee's bargaining unit work assignments and close-out performance appraisals with respect to bargaining unit work performed. *See, e.g., NAGE, Local R1-144, FUSE*,

38 FLRA 456, 459-64 (1990).

56 FLRA 906, 912 (2000) (previous practices of parties and testimony support conclusion that local moves not reassignments covered by parties' agreement). As such, the record does not establish that reassignments to supervisory positions are covered by the agreement under either Prong I or Prong II of the *SSA* test. *See NATCA*, 61 FLRA 437, 441-42 (2006) (“[T]he Authority has found proposals not to be expressly contained in contract provisions where the proposals did not modify and/or conflict with the express terms of the contract provisions even if the proposals concerned the same general range of matters addressed in the provisions.”). In these circumstances, the Agency has not demonstrated that the Arbitrator erred in concluding that the matter of directed reassignments to supervisory positions is not covered by the parties' agreement.⁵ Accordingly, we deny the Agency's covered by exception.

V. Decision

The Agency's exceptions are denied.

5. In view of this conclusion, it is unnecessary to address the Union's contentions as to whether an expired agreement can serve as the basis of a covered by defense. However, in this regard *see United States Border Patrol Livermore Sector, Dublin, Calif.*, 58 FLRA 231, 233 (2002).