

63 FLRA No. 149

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION
(Union)

0-AR-4009

DECISION

June 30, 2009

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Joseph M. Sharnoff 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 parties negotiated a letter of understanding (LOU), and the Union filed a grievance protesting the Agency's failure to comply with the LOU. The Arbitrator sustained the grievance. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

Article 18, Section 3 of the parties' collective bargaining agreement provides for payment of a differential to traffic management coordinators (TMCs) assigned the duties of a traffic management coordinator-in-charge (TMCIC). Award at 3 (quoting agreement). Three grievances were filed claiming that the Agency had failed to pay TMCs the differential required by Article 18.

Subsequently, the parties negotiated a LOU, in which the Agency agreed to make whole TMCs who had performed coordinator-in-charge (CIC) duties, but had not been paid the differential. *Id.* at 30. A work group of managers and union representatives was formed to implement the LOU. As a result of the work group, the Agency distributed a memorandum to man-

agers (memorandum) to clarify the assignment of TMCIC duties and the payment of the differential. In addition, the parties announced a "tentative agreement" to "close out" the grievances with a lump-sum settlement and the issuance of a new policy statement. *Id.* at 22, 34. However, as a result of the Authority's decision in *United States Department of Transportation, Federal Aviation Administration*, 58 FLRA 175 (2002) (*FAA*), the Agency did not finalize the tentative agreement.¹ *Id.* at 34.

The Union filed the grievance in this case protesting the Agency's failure to comply with the LOU. The parties were unable to agree on the issues for resolution, and the Arbitrator framed the issue, as follows: "Whether the Agency violated the terms of the [LOU] and, if so, what is the appropriate remedy?" *Id.* at 2.

The Arbitrator found that this case was unlike *FAA* because it involved the Agency's agreement that certain TMCs previously had performed CIC duties, but were not paid the differential, and that, as a result, they were entitled to backpay. *Id.* at 29-30. The Arbitrator further found that, although the parties had reached agreement in the LOU, they subsequently acknowledged that they did not fully agree on the meaning and application of the LOU and submitted the disagreements to a work group for further consideration. In this regard, he concluded that the work group reached some agreements that clarified the LOU. *Id.* at 33, 35-36

Based on the foregoing, the Arbitrator sustained the grievance "to the extent that the [p]arties already have agreed, to what appeared to be a resolution of all issues in the [LOU], followed by what appeared to be a resolution of most, but not all, of the remaining issues in the subsequent [memorandum to managers]." *Id.* at 36. As a remedy, the Arbitrator ordered the Agency to pay the differential to employees who had actually performed CIC duties but had not been paid in accordance with the LOU and the memorandum. The Arbitrator also ordered the Agency to pay the differential to any other employee who actually performed CIC duties during all, or a portion of, a shift. *Id.*

The Arbitrator rejected the Agency's argument that employees are not eligible for the differential under Article 18 unless management actually assigns the employee to the CIC position. *Id.* In rejecting the argu-

1. As discussed in more detail, *infra*, the Authority held in *FAA* that the arbitrator's award, which required the Agency to assign air traffic controllers to perform controller-in-charge duties in certain situations, was contrary to management's right to determine its organization under § 7106(a)(1) of the Statute. 58 FLRA at 179.

ment, the Arbitrator relied on the understanding of the agency official who signed the LOU as to the meaning of “performed CIC duties” under the LOU. *Id.* The official testified that entitlement to backpay depended on whether the employee performed the CIC duties: “[I]f you actually work it, we will pay you for it[.]” *Id.*

In explaining the remedy, the Arbitrator stated that payment of the differential “is required only insofar as the Agency actually already directed TCMs to perform CIC duties, or . . . knowingly permitted TCMs to perform CIC duties and did nothing to have such employees cease performing those duties.” *Id.* at 37. The Arbitrator specified that the award “is not intended to require the Agency to ‘assign’ employees to the TMC-CIC classified position either retroactively or prospectively.” *Id.* at 38.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency contends that the award is contrary to management’s rights to direct employees and to assign work under § 7106(a)(2)(A) and (B) of the Statute and to determine its organization under § 7106(a)(1) of the Statute. Exceptions at 6, 8. The Agency also contends that the Arbitrator erred by awarding payment of the differential to TCMs who were not officially assigned CIC duties. *Id.* at 8.

As to § 7106(a)(2)(A) and (B), the Agency maintains that the right to assign both supervisors and TCMs is affected by the award. *Id.* at 7. The Agency also asserts that the award conflicts with the rights to direct which employees will be assigned the work of CIC. The Agency claims that, by requiring payment of the differential without requiring employees to have been officially assigned CIC duties, the award undermines management’s role in determining what work has to be done and who will do it. *Id.*

The Agency also argues on the basis of *FAA* that the award conflicts with its right to determine its organization. *Id.* at 8. The Agency claims that the award limits the assignment of TCMs in a manner similar to the limitations found to conflict with management’s right to determine its organization in *FAA*. The Agency claims that, under the award, “TCMs working as CICs are to supervise traffic management operations and not air traffic control operations.” *Id.*

As to the Arbitrator’s remedy, the Agency concedes that qualified employees who were directed to, and actually performed, CIC duties and were not paid the differential are entitled to backpay. *Id.* However,

the Agency asserts that the Arbitrator erred by ordering payment of the differential to TCMs who merely were knowingly permitted by the Agency to perform CIC duties. *Id.* at 8-9.

The Agency maintains that the entitlement to the differential is governed by the parties’ collective bargaining agreement and the Agency’s regulations and that, under the agreement and regulations, an employee must be assigned CIC duties to be paid the differential. *Id.* at 8-10. The Agency claims that the Arbitrator’s application of the term “knowingly permitted” is derived from the phrase “suffered or permitted” in the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. *Id.* at 9. The Agency argues that the Arbitrator erred in using a phrase from the FLSA because it applies to overtime, not to other types of premium pay, and because the Agency is not covered by the FLSA. *Id.* The Agency asserts that, to support the disputed backpay, the Arbitrator was required to find, but did not find, a violation of the agreement or regulation.

B. Union’s Opposition

The Union asserts that the Agency’s exceptions are deficient under § 2425.2(b) and (c) of the Authority’s Regulations because the Agency fails to cite any cases to substantiate its contention that the award is contrary to management’s right to assign work under § 7106(a)(2)(B). Opposition at 3. Alternatively, the Union argues nothing in the award forces the Agency to assign CIC duties or allows employees to assume CIC duties. *Id.* at 4. The Union also argues that the Arbitrator did not apply the FLSA. In this regard, the Union agrees with the Agency that the FLSA does not apply here, but disagrees with the Agency’s claim that it is not covered by the FLSA generally. *Id.* at 8.

IV. Preliminary Matter

Under the Authority’s Regulations, an exception must “set forth in full” the following: “(a) A statement of the grounds on which review is requested; (b) Evidence or rulings bearing on the issues before the Authority; [and] (c) Arguments in support of the stated grounds, together with specific reference to pertinent documents and citations of authorities.” 5 C.F.R. § 2425.2(a)-(c). The Agency specifies § 7106(a)(2)(B) of the Statute as the legal authority for its exception and sets forth the alleged basis on which the award is contrary to § 7106(a)(2)(B). This constitutes sufficient substantive information for the Authority to consider the exception and satisfies the requirements of § 2425.2. *AFGE Local 1698*, 57 FLRA 1, 2 (2001) (specific statutory references sufficient to satisfy requirements of

§ 2425.2). Accordingly, we conclude that the Agency's exceptions are procedurally sufficient.

V. Analysis and Conclusions

A. The award is not contrary to management's rights to direct employees and to assign work under 7106(a)(2)(A) and (B) of the Statute.

When a party's exception challenges an arbitration award's consistency with law, we review *de novo* the questions of law raised in the exception and the arbitrator's award. *E.g., NFFE Local 1437*, 53 FLRA 1703, 1709 (1998). In applying a standard of *de novo* review, we assess whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* at 1710. When a party contends that an award is contrary to management's rights under § 7106(a) of the Statute, we first assess whether the award affects the asserted rights. *United States Dep't of Veterans Affairs Med. Ctr., Coatesville, Pa.*, 56 FLRA 966, 971 (2000). If the award does not affect the asserted rights, then the exception is denied. *Id.*

The Arbitrator emphasized that the award "is not intended to require the Agency to 'assign' employees to the TMC-CIC classified position either retroactively or prospectively." *Id.* at 38. He stated that the award of backpay addressed situations where management had previously exercised its discretion, and the prospective application of the award acknowledged management's discretion to assign the CIC work in the future. *Id.* Against this background, the Agency fails to demonstrate how the backpay award, which addresses the financial consequences of the manner in which the Agency previously exercised its rights to direct employees and to assign work, requires the Agency to exercise its rights in a certain manner. *See AFG Local 727*, 59 FLRA 674, 677 (2004) (requirement to properly compensate employees for work performed does not affect management's right to assign work under § 7106(a)(2)(B)). Likewise, as the award specifies that management has full discretion to assign CIC duties in the future, the Agency fails to demonstrate how the prospective portion of the award requires it to exercise its rights in a certain manner. Award at 38. Accordingly, the Agency has not established that the award affects its rights, and we deny this exception.

B. The award is not contrary to management's right to determine its organization under 7106(a)(1) of the Statute.

Management's right to determine its organization encompasses the right to determine the administrative and functional structure of the agency, including the

relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties. *FAA*, 58 FLRA at 178. The Agency argues that, as in *FAA*, the Arbitrator's award affects its right to determine its organization because, under the award, "TMCs working as CICs are to supervise traffic management operations and not air traffic control operations." Exceptions at 8.

The Agency's reliance on *FAA* is misplaced. In *FAA*, the award was contrary to management's right to determine its organization because it was "determinative of the organization of the midnight shift [by] . . . specif[ying] the nature and scope of the supervisory relationships, or lines of authority, on that shift." *FAA*, 58 FLRA at 178. In this case, the Arbitrator did not determine shift organization or specify the nature and scope of the supervisory relationships, or lines of authority, on any shift. To the contrary, as the Arbitrator specified, the award does not require the Agency to assign employees to the TMC-CIC position either retroactively or prospectively. Award at 38.

Accordingly, we deny this exception.

C. The award is not deficient by ordering payment of the differential to TMCs who were knowingly permitted to perform CIC duties.

The Agency contends that the award is deficient by ordering payment of the differential to TMCs who were knowingly permitted to perform CIC duties. The Agency claims that the Arbitrator erroneously applied this standard from the FLSA and failed to find a violation of the agreement or regulation.

It is clear from the award that the Arbitrator found a violation of the LOU and enforced the Agency's agreement in the LOU to pay the differential. In this regard, the Arbitrator stated the issue as whether the Agency violated the terms of the LOU and, if so, what is an appropriate remedy. Award at 2. He sustained the grievance and ordered the Agency to pay the differential to employees who were entitled to have been paid the differential under the terms of the LOU. *Id.* at 36. In finding a violation of the LOU, the Arbitrator specifically interpreted and applied the term "performed CIC duties" under the LOU. *Id.* In so doing, the Arbitrator relied on the understanding of the agency official who signed the LOU as to the term's meaning. *Id.* Thus, the award is specifically based on the terms of the LOU and on the Arbitrator's conclusion that the Agency failed to comply with those terms.

Consistent with the foregoing, we reject the Agency's claims that the award is based on the FLSA

and that it is not based on a violation of the LOU. Moreover, the Agency's bare assertion that TMCs must be assigned CIC duties to be entitled to the differential provides no basis for finding deficient the Arbitrator's interpretation and application of the terms of the LOU to find TMCs knowingly permitted to perform CIC duties entitled to the differential. *See NFFE Local 1442*, 61 FLRA 857, 860 (2006) (bare assertions are insufficient to establish that an award is deficient).

Accordingly, we deny this exception.²

VI. Decision

The Agency's exceptions are denied.

2. We note that the Authority previously has rejected the Agency's claim that it is not covered by the FLSA. *United States Dep't of Transp., Fed. Aviation Admin.*, 61 FLRA 750, 752 (2006). Likewise, the court in *Abbey v. United States*, 82 Fed. Cl. 722, 738 (2008) held that the FLSA applies to the Agency's employees.