

63 FLRA No. 172

UNITED STATES DEPARTMENT OF THE TREA-
SURY
INTERNAL REVENUE SERVICE
(Agency)
and

NATIONAL TREASURY EMPLOYEES UNION
(Union)
0-AR-4235

DECISION

August 11, 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 Jerome H. Ross 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 to the Agency's exceptions.

The Arbitrator found that the Agency violated Article 47 of the parties' collective bargaining agreement and § 7116(a)(5) of the Statute when it failed to provide the Union with an opportunity to bargain over the impact of a memorandum concerning a commuting mileage limitation on flexiplace locations. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

In 2002, the parties entered into an agreement, Article 50 of which provided for a flexiplace program that permitted employees to work "at home or at other approved locations remote to the assigned post of duty." Award at 11 (quoting Article 50 of agreement). The 2002 agreement also allowed for a "mid-term reopener" during which each party could reopen five provisions. *Id.* at 12. During the reopener period, the Agency sought to reopen Article 50 to include the following:

Flexiplace locations approved by the Employer must be located within the normal commuting area of the employee's assigned P[ost] O[f] D[uty].

Id. at 13. In a subsequent counterproposal, the Agency substituted the phrase "the recognized commut-

ing area of the metropolitan area" for "the normal commuting area." *Id.* Subsequently, the Agency abandoned its efforts to modify Article 50. *Id.* at 14-15.

In January 2006, another agreement became effective. *Id.* at 2. Article 50 of the 2006 agreement addresses the subject of flexiplace but does not contain wording that limits flexiplace locations to commuting areas. *Id.* at 3, 16. By memorandum dated March 6, 2006 (the memorandum), the Agency's Director of the Workforce Relations Division, issued guidance to managers on appropriate flexiplace locations. *Id.* at 4. The memorandum states, in relevant part, that in "the [f]lexiplace site must be by IRS policy within the regulatory commuting area." *Id.* at 5.

The Union filed a grievance alleging that the limitation on flexiplace sites in the memorandum was implemented without affording it notice and an opportunity to bargain as required by Article 47 of the 2006 agreement.¹ *Id.* at 1. The Union also asserted that the Agency violated §§ 7114(a)(1) and (4) and 7116(a)(5) of the Statute. *Id.* at 1-2. When the grievance was not resolved, it was submitted to arbitration, where the parties stipulated to the following issue:

Whether the Agency had an obligation under the . . . [a]greement or law to negotiate the [m]emorandum concerning the commuting mileage limitation to the parties' Flexiplace Agreement; and, if so, what is the appropriate remedy?

Id. at 6.

The Arbitrator found that the Agency violated Article 47 and § 7116(a)(5) of the Statute when it failed to provide the Union an opportunity to bargain over the impact of the memorandum. Based on his analysis of the wording of and bargaining history concerning Article 50, the Arbitrator rejected the Agency's claim that the memorandum merely clarified existing supervisory authority. *Id.* at 14. In so doing, the Arbitrator noted there was no reference to a "commuting mileage limitation" in either the 2002 or 2006 agreement. *Id.* at 14, 16. In addition, the Arbitrator construed the Agency's efforts to modify Article 50 to include a commuting area limitation during reopener negotiations as indicating that, in the Agency's view, such modification was necessary. *Id.* at 14-15. Moreover, the Arbitrator noted that the fact that the Agency dropped its efforts to

1. Article 47, which addresses "Mid-term Bargaining," provides that, unless permitted by law, changes will not be implemented until the Union is afforded proper notice and opportunity to bargain. Award at 2.

include a commuting area limitation in the Article 50 did “reflect on the drafters’ intent with regard to the agreed upon language.” *Id.* at 15.

Additionally, the Arbitrator found the record did not establish that: (1) any legal or regulatory authority set forth a mileage limitation on a flexiplace location or (2) Article 50 was contrary to law or regulation. *Id.* at 16. Accordingly, the Arbitrator concluded that the Agency violated Article 47 of the 2006 agreement and §7116(a)(5) of the Statute when it failed to provide the Union an opportunity to bargain over the impact of the memorandum. *Id.* at 17. As a remedy, the Arbitrator directed, among other things, that the Agency reinstate the *status quo ante* and post a notice to be signed by the Commissioner of the Internal Revenue Service (IRS). *Id.* at 17-19.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency contends that the award: (1) is contrary to law and (2) does not draw its essence from the agreement. Exceptions at 1.

As for the first claim, the Agency argues that the award is contrary to law because it requires the Agency to bargain over a matter that is “covered by” the parties’ agreement. *Id.* at 5. According to the Agency, Article 50 comprehensively covers the topic of flexiplace and, as there is no prohibition in the agreement on use of a commuting mileage limitation, it has the right to impose a restriction unilaterally. *Id.* at 8-9. The Agency also argues that the award is contrary to law because requiring the Commissioner of IRS to sign the notice to employees is not consistent with remedies issued in unfair labor practice (ULP) cases. *Id.* at 12. The Agency asserts that the signatory should be the Director of Workforce Relations. *Id.*

As to the second claim, the Agency argues that the award fails to draw its essence from the parties’ agreement because the Arbitrator ignored the Agency’s contractual right to determine flexiplace sites. *Id.*

B. Union’s Opposition

The Union argues that a commuting area mileage limitation on flexiplace locations is not covered by the parties’ agreement. Opposition at 10, 14. The Union points to the Agency’s failed attempts during reopener negotiations to modify the agreement to include a commuting area mileage limitation. *Id.* The Union also maintains that the Authority has previously ordered that the Commissioner of IRS sign notices. *Id.* at 19. In

response to the Agency’s “essence” exception, the Union contends that the Arbitrator thoroughly analyzed relevant portions of the parties’ agreement and that the exception does not demonstrate that the award is deficient. *Id.*

IV. Analysis and Conclusions

A. The award is not contrary to law.

When an exception challenges an award’s consistency with law, the Authority reviews the question of law raised by the exception *de novo*. *E.g., NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying the standard of *de novo* review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings. *See NTEU, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings. *See, e.g., id.*

The “covered by” doctrine is a defense to a claim that an agency failed to provide a union with notice and an opportunity to bargain over changes in conditions of employment.² *See, e.g., United States Dep’t of the Interior; Wash., D.C.*, 56 FLRA 45, 53 (2000). In this regard, the “covered by” doctrine excuses parties from bargaining when they have already bargained and reached agreement concerning the matter at issue. *See, e.g., United States Dep’t of Health and Human Services, Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1015 (1993). The doctrine has two prongs. Under the first prong, if a party seeks to bargain over a matter that is expressly addressed by the terms of the parties’ collective bargaining agreement, then the other party may properly refuse to bargain over the matter. *See, e.g., United States Customs Service, Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000). Under the second prong, if a matter is not expressly addressed by the terms of the parties’ collective bargaining agreement, but is nonetheless inseparably bound up with and, thus, an aspect of a subject covered by the terms of the agreement, then the other party may also properly refuse to bargain over the matter. *See, e.g., id.* If a contract provision does not expressly encompass the subject

2. To the extent that the arbitration involved an allegation that the Agency violated § 7116(a)(5) of the Statute, the burdens of proof that apply to litigation of ULPs under § 7118 attached. *See AFGI, Local 940*, 52 FLRA 1429, 1438-39 (1997). In ULP litigation, “covered by” is an affirmative defense. *See, e.g., Soc. Sec. Admin.*, 55 FLRA 374, 377 (1999). Under § 2423.32 of the Authority’s Regulations, the respondent bears the burden of proving affirmative defenses.

matter sought to be bargained, the Authority will, in conjunction with prong 2, examine the parties' bargaining history and intent to determine whether the matter sought to be bargained is an aspect of matters already bargained. *See, e.g., id.*

Applying the foregoing here, the Arbitrator found, and there is no dispute, that Article 50 does not contain a commuting mileage limitation on the designation of flexiplace locations. Additionally, the Arbitrator found the bargaining history of that Article demonstrated that the Agency recognized a need for a modification of the agreement to establish such a limitation. The Arbitrator found that although the Agency proposed such modification, it later abandoned its efforts. Based on the Arbitrator's interpretation of the agreement and its bargaining history, we find that the matter of a commuting mileage limitation on flexiplace locations is neither expressly addressed by nor inseparably bound up with the parties' agreement. Accordingly, the Arbitrator did not err in finding that the disputed matter is not covered by the parties' agreement.

We also find that the remedy is not contrary to law. In this regard, in cases where arbitrators resolve ULP allegations, the Authority upholds the arbitrator's remedy unless it is "a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *NTEU*, 48 FLRA 566, 572 (1993) (quoting *NTEU v. FLRA*, 910 F.2d 964, 968 (D.C. Cir. 1990) (*en banc*)) (emphasis in original). The Authority has noted that this "is a heavy burden indeed." *Id.* (quoting *NTEU v. FLRA*, 910 F.2d at 968).

In ULP cases processed under § 7118 of the Statute, the Authority typically directs that a posting be signed by the highest official of the activity responsible for the violation. *See, e.g., United States Dep't of Labor, Wash., D.C.*, 61 FLRA 825, 826 (2006). Moreover, the Authority has found that the Commissioner of IRS was an appropriate signatory on a posting relating to the interpretation and application of the parties' nationwide agreement. *See United States Dep't of the Treasury, Internal Revenue Serv.*, 56 FLRA 906, 914 (2000) (*IRS*). In this case, applying the foregoing standards, the Agency fails to establish that the award, requiring the Commissioner of IRS to sign the notice, constitutes a patent attempt to achieve ends other than those that effectuate the policies of the Statute. Accordingly, the remedy awarded by the Arbitrator is not contrary to law.

B. The award draws its essence from the agreement

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *E.g., United States Dep't of Homeland Sec., United States Customs and Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 129, 132 (2007). Under that standard, an arbitration award is deficient when the appealing party establishes the award (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *Id.* at 133.

The Agency's claims that the parties' agreement should be interpreted as providing it unfettered discretion to impose a commuting area limitation on flexiplace sites. Exceptions at 9. However, nothing in Article 50 speaks to commuting area limitations on flexiplace locations. As such, the Agency's exception does not establish that the Arbitrator's interpretation is irrational, unfounded, or implausible, or evidences a manifest disregard of the agreement. Accordingly, we deny this exception. *See AFGE*, 59 FLRA 767, 771 (2004).

V. Decision

The Agency's exceptions are denied.