64 FLRA No. 20

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
DENVER, COLORADO
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 32
(Union)

0-AR-4068

DECISION

September 30, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Kenneth Cloke filed by the Agency under § 7122 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 Arbitrator found that the Agency violated the parties' agreements providing for alternative work schedules (AWS) when the Agency changed the AWS schedules of four unit employees by changing their regular day off from Monday to Wednesday.

For the reasons discussed below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievants are Customer Service Representatives assigned to the Agency's Denver-based Customer Accounts Management call site, which is responsible for receiving and answering taxpayers' telephone inquiries. The grievants work an AWS of 4, 10-hour days. Due to workload considerations, the Agency required them to change their day off from Monday to Wednesday. The Union filed a grievance contesting the Agency's "unilateral change of days off from Monday to Wednesday," and alleging a violation of the parties' Tour of Duty (TOD) agreement and the 2002 National Agreement. Award at 11. Thereafter, the grievance was amended to allege a violation of the Flexible and Compressed Work Schedules Act, 5 U.S.C. §§ 6120-6133 (the Act), [2] and was submitted to arbitration on the following stipulated issues:

> 1. Did the [A]gency violate the law or contract when it unilaterally changed the regular day off in the 4 X 10 Alternative Work Schedules of [the four grievants]?
>
> 2. If so, what is the appropriate remedy?

Id. at 3.

The Arbitrator found that it was uncontested that: (1) Mondays are the busiest call day for the work unit; (2) the Agency would have shown a substantial "deficit" in responding to taxpayers' calls for the month in which the change took effect unless the Agency changed the days off; (3) the Agency briefed the Union in advance of its intention to change the days off; (4) the Union did not request to bargain over the decision or its implementation and impact; (5) the changes were implemented at all of the Agency's twenty-six call sites; and (6) the month in which the change took effect showed a deficiency in the Agency's response capability, even though Monday had been eliminated as a day off. *Id.* at 19-20.

1. Member Beck's dissenting opinion is set forth at the end of this decision.

2. Section 6131 of the Act provides, in pertinent part:

> (a) Notwithstanding . . . any collective bargaining agreement and subject to subsection (c) of this section, if the head of an agency finds that a particular flexible or compressed schedule . . . has had or would have an adverse agency impact, the agency shall promptly determine not to — . . .
>
> (2) continue such schedule . . .
>
> (b) For purposes of this section, "adverse agency impact" means —
>
> (1) a reduction of the productivity of the agency;
>
> (2) a diminished level of services furnished to the public by the agency; or
>
> (3) an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed schedule).
>
> . . . .
>
> (c)(3)(A) If an agency and an exclusive representative have entered into a collective bargaining agreement providing for use of a flexible or compressed schedule . . . and the head of the agency determines under subsection (a)(2) to terminate a flexible or compressed schedule, the agency may reopen the agreement to seek termination of the schedule involved.

After reviewing the parties' respective arguments, the Arbitrator stated that there were four "principal" issues before him: (1) "whether the shift from Mondays to Wednesdays constituted a 'termination' of AWS under the [Act];" (2) "whether the parties entered into a written agreement that limited the Agency's right to shift from Mondays to Wednesdays off;" (3) "whether the earlier work schedule had an 'adverse agency impact';" and (4) "whether the Agency refused to bargain, or the Union waived its right to bargain over these changes." Award at 21.

With respect to the first issue, the Arbitrator "assume[d]" that, but found it "unnecessary to reach a final decision on whether[,] the Agency's action constituted a termination" within the meaning of the Act. *Id.* at 22-23.

The Arbitrator then turned to the second issue and considered "whether the parties entered into a written agreement limiting the Agency's right to switch from Mondays to Wednesdays off, based on several labor management agreements." *Id.* at 23. The Arbitrator considered the following contract provisions (the Agreements): (1) Section 7A, subsection 11 and Section 7C of the parties' local Customer Service Agreement (CSA);[3] (2) Section 2 C (1) of the TOD agreement;[4] and (3) Article 23, Sections 2A and 9 of the parties' 2002 National Agreement.[5] Taking the Agreements "in sum," the Arbitrator found that they were intended "to require the parties to bargain locally over changes in AWS, to require a showing of adverse impact in advance of any changes, and to protect employees from unnecessary disruption of their work schedules," especially when the Agency had transitioned to a five-day work week. *Id.* at 26-27. In particular, the Arbitrator concluded that the Agreements "permit the Agency to make changes in employees[']s days off, provided it is able to demonstrate an adverse agency impact and is willing to bargain with the Union over whether the Agency has met its burden of proof regarding adverse impact, which less onerous options might be used instead, and over implementation and impact." *Id.* at 28.

The Arbitrator then assumed without deciding that the change in schedules constituted a schedule "termination" under the Act, but stated that, even if it was not a termination, "there is still a requirement, in the absence of a waiver by the Union[,] that the parties negotiate over impact and implementation." *Id*. at 29. In this connection, the Arbitrator determined that the impact of the change was greater than *de minimis*. *See id.* at 31. The Arbitrator also determined that the Agency head's failure to make a determination of "adverse impact . . . preclude[d] a finding that the Union waived its right to negotiate[.]" *Id.* at 32. In this regard, the Arbitrator determined that the Union was entitled to "be given an opportunity to argue that the Agency has not met its burden of proof, suggest alternative ways of achieving its aims, and negotiate regarding implementation and impact." *Id.* at 30. However, noting that the Union did not request to negotiate over the proposed changes, the Arbitrator found that "the Union's failure to request a negotiation precludes a finding that the Agency refused to bargain." *Id.* at 32.

The Arbitrator concluded that "the Agency did not refuse to bargain with the Union, nor did the Union waive its right to bargain with the Agency." *Id.* The Arbitrator also concluded that "the Agency did not violate law *or contract . . ., except to the extent that it failed to have a head of agency make the determination of adverse impact.*" *Id.* (emphasis added). As a remedy, the Arbitrator directed that the grievants be offered the option of returning to their previous schedules or retaining their current schedules until an adverse impact determination can be made, and that "the Union be afforded a full opportunity prior to making that determination to offer less onerous alternatives, and to negotiate impact and implementation." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to law because a "mere change" in an employee's day off is not a termination of an alternative work schedule

3. Section 7A, subsection 11 provides, in pertinent part, that when the Agency decides to change an employee's tour of duty or hours "for more than a total of eight (8) weeks in a calendar year, it must negotiate with the union to the extent provided by law" and must also "demonstrat[e] . . . adverse impact consistent with" the Act. Award at 23-24. Section 7C provides, in pertinent part, that "AWS off days will not be scheduled on Mondays or Saturdays due to projected workload." *Id.* at 24.

4. Section 2 C (1) of the TOD agreement provides, in pertinent part: "Affected employees under this agreement may retain their current AWS. *If an affected employee is currently off on a Monday or Friday, that employee will continue to have Monday and Friday off unless the employee agrees to a different day off.*" Award at 25 (emphasis in Award).

5. Article 23, Section 2A of the 2002 National Agreement provides that "all terms and conditions of Alternative Work Schedules (AWS) agreements will remain in effect unless the Parties mutually agree to renegotiation (or mutually agree to authorize their local representatives to renegotiate) said local agreements." Award at 26. Article 23, Section 9 provides: "Nothing in this article shall restrict the Employer's right to assign work or employees pursuant to" § 7106(a) of the Statute. *Id.*

under the Act. Exceptions at 1. Therefore, according to the Agency, an Agency head determination of adverse impact is not required. The Agency further contends that, even assuming the change was a termination under § 6131, vesting agencies with the ability to modify a compressed schedule is appropriate where, as here, the impact of the change is only *de minimis*.

Alternatively, the Agency argues that, to the extent that the award finds a contract violation, "requiring agency head review excessively interferes with management's right to assign work." *Id.* at 1. The Agency asserts that it could not provide competent service to the public if it needed an agency head determination of adverse impact every time it changed an employee's day off.

B. Union's Opposition

The Union asserts that the Agency's action constituted a schedule termination under the Act and that the Agency did not follow the procedures required by § 6131 of the Act before terminating the schedule. The Union also asserts that, pursuant to the Agreements, the Agency was obligated to bargain "'locally over changes in AWS, [and] to require a showing of adverse impact in advance of *any* changes[.]'" *Id.* at 11 (quoting Award at 26-27, emphasis in Opp'n). Finally, according to the Union, the Agency's management rights claim provides no basis for finding the award deficient because the schedule termination is fully negotiable under the Act.

IV. Analysis and Conclusions

The Agency argues that the award is contrary to law. The Authority reviews questions of law raised by exceptions to an arbitrator's award *de novo*. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of *de novo* review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The award is not contrary to management's right to assign work.

The Agency argues that, to the extent that the award finds a contract violation, "requiring agency head review excessively interferes with management's right to assign work." Exceptions at 1. It is well established that under the Act, alternative work schedules are fully negotiable and enforceable, subject only to the Act itself or other laws superseding it. *See, e.g., United States DOJ, Fed. Bureau of Prisons, Fed. Corr. Inst., Oakdale, La.,* 59 FLRA 277, 278 (2003) (Member Pope dissenting in part on other grounds). In this regard, the Authority has held that § 7106 of the Statute provides no basis for finding an award relating to alternative work schedules deficient because such schedules are fully negotiable and enforceable without regard to the exercise of management rights. *See United States EPA, Research Triangle Park, N.C.*, 43 FLRA 87, 92-93 (1991). In this case, the Arbitrator relied on the Agreements, which address unit employees' participation in alternative work schedules under the Act. As such, the Agency's management's rights argument provides no basis for finding the award deficient, and we deny the exception.

B. The Agency has not demonstrated that the award is contrary to the Act.

The Agency contends that the award is contrary to the Act because the change in the day off is not a "termination" of a schedule under § 6131. Even assuming that the Arbitrator determined that the change was a "termination" under the Act, [6] and that the Agency head thus was required to make an adverse impact determination, the Arbitrator alternatively found that the Agreements required an adverse impact determination and bargaining with the Union.

The Authority has consistently held that when an award is based on separate and independent grounds, an appealing party must establish that *all* of the grounds are deficient in order to have the award found deficient. *See, e.g., United States Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000). If the excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the Arbitrator, then it is unnecessary to address exceptions to the other ground. *Id.*

The Arbitrator based his award, at least in part, on a finding that the Agency violated the parties' agreements providing for alternative work schedules. *See* discussion *supra* Part II. The Agency does not argue that in reaching this conclusion the Arbitrator erred in his interpretation of the agreements or that the agree-

6. As set forth above, although the Arbitrator stated that it was "unnecessary to reach a final decision" on whether the Agency's action constituted a termination under the Act, he also stated that "the Agency did not violate *law* or contract by changing regular days off in the [AWS] schedules . . . except to the extent that it failed to have a head of [A]gency make the determination of adverse impact." Award at 32 (emphasis added). We need not address this apparent inconsistency further because, as discussed *infra*, the Arbitrator's finding of a contractual violation provides a sufficient basis for the award.

ments are contrary to the Act. As such, the Agency does not demonstrate that the Arbitrator's finding of a contractual violation is deficient. As that finding provides a sufficient basis for the award, it is not necessary to address whether the Arbitrator's award is contrary to the Act. Accordingly, we deny the exception. [7]

V. Decision

The Agency's exceptions are denied.

Member Beck, Dissenting:

I would vacate the Arbitrator's award.

The Arbitrator does not properly find either a contract violation or a violation of law. Instead, the Arbitrator appears to conflate the statutory requirement of agency head review, which is found in the Flexible and Compressed Work Schedules Act (Act), with the Agency's contractual obligations, which do not include agency head review.

The Arbitrator fails to find that the Agency terminated the alternative work schedule (AWS) within the meaning of the Act. Award at 22-23 (Arbitrator states that he does not "reach a final decision" as to whether the Agency terminated AWS under the Act). The failure to find a termination necessarily prohibits the Arbitrator from concluding (1) that agency head review was necessary, or (2) that the Agency violated the Act.

The crux of the Arbitrator's award is his conclusion that "the Agency did not violate law or contract . . . *except to the extent that it failed to have a head of agency make the determination of adverse impact*." Award at 32 (emphasis added). But agency head review is required only under the Act, not under the parties' contract, and agency head review is necessary only if AWS is terminated. Consequently, the Arbitrator could not have found a violation of the Act. Further, he could not have found the lack of agency head review to constitute a contractual violation, because there is nothing remotely like a requirement of agency head review in the parties' contract. Award at 6-10 (setting forth the pertinent contract provisions).

Accordingly, I would vacate the award.

7. In view of this determination, it is unnecessary to address the Agency's claim that, even if a change in employees' days off constitutes a termination under the Act, the change is *de minimis* and thus not subject to the Act's procedural requirements. *See generally United States Dep't of Homeland Sec., Border and Transp. Sec. Directorate, Bureau of Customs and Border Prot., Wash., D.C.*, 59 FLRA 728, 728-29 (2004) (agency has no statutory obligation to bargain if change is *de minimis*).