64 FLRA No. 189

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C.
(Agency)

0-AR-4328

_____

DECISION

June 30, 2010

_____

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Jerome H. Ross filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions. As part of its opposition, the Agency also filed a motion to dismiss the exceptions; the Union filed a motion for leave to file a response to the Agency's motion.[1]

The Arbitrator denied the Union's grievance alleging that the Agency committed an unfair labor practice (ULP) and violated the parties' national agreement by making, on a "systemic" basis, unilateral changes to the working conditions of seasonal employees. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The parties' national agreement expired on June 30, 2006. At that time, the Agency notified the Union that it would continue to honor the mandatory procedures and arrangements of the agreement, but that it would withdraw from certain permissive terms. Award at 5. The parties' agreement contained several provisions that permitted the Agency to establish agreements directly with its seasonal employees and to set their conditions of employment.[2] *Id.* at 6, 8-9. On July 11, 2006, the Union notified the Agency that it planned to "withdraw its waiver" regarding these issues. *Id.* at 8. Specifically, the Union informed the Agency that "[a]ny decision or actions we took not to bargain over [the seasonal employment agreements] or any other negotiable matter was at best a waiver of our rights to bargain. When you terminated the [parties' agreement], you terminated any express or implied waivers [of the right to bargain] under it." Exceptions, Jt. Ex. 5 at 3. The Union, accordingly, asked the Agency to abide by "the national negotiations policy." *Id.* The Agency, however, continued to make "unlawful unilateral changes" to seasonal employees' terms and conditions of employment. Award at 8.

The Union subsequently filed a grievance, which the Agency denied. The matter was unresolved and was submitted to arbitration. *Id.* at 1-2. The parties stipulated to the following two issues:

> 1. Whether [the Agency] violated 5 [U.S.C. §] 7116 of the Statute when it negotiated seasonal employment agreements directly with bargaining unit employees after [the Union] gave notice to [the Agency]; and if so, what is the appropriate remedy?
>
> 2. Whether [the Agency] violated Article 47.2 of the [parties' agreement] and [§] 7116(a)(1) and (5) when it failed to notify and negotiate with [the Union] concerning changes in the bargaining unit employees' seasonal employment agreements; and if so, what is the appropriate remedy?

1. The Union requests leave under § 2429.26 of the Authority's Regulations to file an opposition to the Agency's motion to dismiss as well as a corrected certificate of service. *See* Union Supp. Submission at 2. Under § 2429.26, the Authority may, in its discretion, grant leave to file other documents as it deems appropriate. The Union did not have an opportunity to address the Agency's argument that the exceptions should be dismissed because the Agency first raised this argument in its opposition. We, accordingly, grant the Union's request and accept the Union's opposition and its corrected certificate of service. *See, e.g., AFGE, Local 2145*, 64 FLRA 231, 231 n.3 (2009).

2. A seasonal employee is a permanent federal employee who works less than twelve months a year and is employed under a seasonal employment agreement. Award at 2.

Id. at 7. In addition, the Union proposed, and the Arbitrator accepted, a third issue:

> 3. Whether [the Agency] violated Article 22. 2 and Article 27.13[3] of the [parties' agreement] when it unilaterally changed the terms of bargaining unit employees' seasonal employment agreements and failed to clearly define the season as closely as practicable so that an employee will have a reasonably clear idea of how much work he or she can expect during the year; and if so, what is the appropriate remedy?

Id.

Noting that there is "no question" that the terms and conditions of the seasonal employment agreements are mandatory subjects of bargaining, the Arbitrator rejected the Union's contention that the Union's actions converted the matter in dispute into a permissive subject of bargaining. Award at 13-14 (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C. & IRS, Cincinnati, Ohio Dist. Office*, 37 FLRA 1423 (1990) (*IRS*)). As a result, the Arbitrator found that, until the parties made other arrangements, the Agency was permitted to continue its longstanding practice of dealing directly with seasonal employees, as long as the Agency acted in conformance with the seasonal employment agreements, the national agreement, and past practice. Award at 14, 16-17.

The Arbitrator also found that the "covered by" doctrine directly applies to the kinds of changes that the Agency made to the seasonal employment agreements. *Id*. at 16. Moreover, in considering the Union's evidence of alleged violations of Articles 22 and 27 of the national agreement in several locations, the Arbitrator found that the Union had failed to prove any Agency-wide "systemic" violations that would warrant a national institutional grievance. *Id*. at 14. The Arbitrator suggested instead that the Union could address the local problems by pursuing grievances at the local level. *Id*. at 17.

III. Positions of the Parties

A. Preliminary Issue

1. Agency's Threshold Issue

As a preliminary matter, the Agency moves to dismiss the Union's exceptions. The Agency alleges that, even though the exceptions were timely filed with the Authority, they were not timely served on the Agency. The Agency also notes that the Union's original certificate of service contained errors. Opp'n at 2. The Agency argues that the general rule that a party may correct deficiencies in a certificate of service absent actual prejudice to the other party should not apply here because the Union also failed to timely serve its exceptions. *Id*. at 2-3.

2. Union's Response

The Union concedes that its exceptions were not timely served on the Agency and that its original certificate of service failed to specify the manner and date of service. *See* Union's Supp. Submission at 2. The Union, however, contends that these errors alone do not warrant dismissal of its exceptions because the Agency has not alleged that it has suffered any prejudice as a result of the foregoing errors. *See id.* at 3-4. As such, the Union asserts that the Authority should deny the Agency's motion to dismiss its exceptions. *See id*. at 4.

B. Merits

1. Union's Exceptions

The Union contends that the award is contrary to law because the Agency violated § 7116(a)(1) and (5) of the Statute when it continued, after the Union withdrew its bargaining "waiver," to deal directly with the seasonal employees and to make changes unilaterally to their employment agreements. Exceptions at 3-4, 13-17. In support of its exception, the Union cites decisions in which the Authority found that certain waivers of bargaining rights were permissive subjects of bargaining and, therefore, immediately terminable by either party once the agreement expired. *See id.* at 14-17 (citing *Dep't of the Treasury, U.S. Customs Serv. & U.S. Customs Serv., Region IX, Chi., Ill.*, 17 FLRA 221 (1985) (*Customs*); *Dep't of Transp., FAA, Wash., D.C. & Its Chi. Airways Facilities Sector*, 16 FLRA 479 (1984) (*DOT*); *FAA, Nw. Mountain Region, Seattle, Wash.*, 14 FLRA 644 (1984) (*FAA*)). The Union contends that it previously had agreed to waive its right to bargain concerning seasonal employees and that it subsequently terminated this waiver. According to the Union, the Agency was required to bargain over the changes that it made to the seasonal employment agreements because the changes impacted bargaining unit employees and had more than a *de minimis* effect on their conditions of employment. *See* Exceptions at 17-21.

3. The relevant portions of the parties' national agreement are set forth in the attached Appendix.

The Union also contends that the Arbitrator exceeded his authority when he determined that the Agency had not made systemic unilateral changes to the agreements. *Id.* at 10-12. According to the Union, whether the Agency made "systemic" changes is beyond the scope of the issues before him. *Id.* at 10-12. The Union seeks nationwide relief, including a nationwide cease and desist order and a nationwide posting of the Agency's violation of the Statute. *Id.* at 21-25.

2. Agency's Opposition

The Agency argues that the Arbitrator correctly held that the Authority's decision in *IRS* was controlling regarding the issue in this case. Opp'n at 5-6. The Agency notes that in *IRS*, the Authority rejected the same argument that the Union makes here. *Id*. at 5-6. In addition, the Agency contends that the Arbitrator properly determined that the Union failed to demonstrate any systemic problems with the seasonal employment agreements. *Id*. at 7-8.

IV. Preliminary Issue

The Agency moves to dismiss the exceptions for two reasons. First, the Agency contends that service of the exceptions was untimely because it took place two days after "the statutory outer limit of 35 days from the date of service of the award (by mail)." *Id.* at 2. Second, the Agency contends that the Union's original certificate of service documented the method of service incorrectly. *Id*. at 2-3.

Although § 7122(b) of the Statute imposes a thirty-day time limit on filing exceptions with the Authority, and § 2429.22 of the Authority's Regulations adds five days if the award is served by mail, neither the Statute nor the Regulations impose a specific time limit on the service of exceptions. Under the Authority's Regulations, a party filing exceptions is required to serve a copy on the other party, but no particular deadline is given. *See* 5 C.F.R. § 2425.1(d). The served party may file an opposition within thirty days after the date of service. 5 C.F.R. § 2425.1(c). Where, as here, the party on whom the exceptions were served filed a timely opposition -- thereby demonstrating that the timing of service did not impede its ability to respond -- the Authority will not dismiss the exceptions. *See NAGE, Local R14-143*, 55 FLRA 317, 318 (1999). The Authority also will not dismiss exceptions on the basis of minor deficiencies that do not impede a party's ability to respond. *See id*. (failure to serve exceptions on all counsel of record not a basis for dismissal); *see also SSA, Branch Office, E. Liverpool, Ohio*, 54 FLRA 142, 145-46 (1998) (failure to include correct docket number and name of case not a basis for dismissal). Accordingly, we deny the Agency's motion to dismiss the Union's exceptions.

V. Analysis and Conclusions

A. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

When a grievance under § 7121 of the Statute involves an alleged ULP, the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118 of the Statute. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Wash., D.C.*, 64 FLRA 559, 560 (2010). In a grievance alleging a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *See AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 909 (1998). However, as in other arbitration cases, including those where violations of law are alleged, the Authority defers to an arbitrator's findings of fact. *See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office*, 52 FLRA 358, 367 (1996).

1. The parties' agreement did not contain a waiver of the right to bargain.

The Union contends that the award is contrary to law because its "waiver" of its bargaining rights regarding seasonal employment agreements was a permissive subject of bargaining that could be withdrawn at any time after the national agreement expired; thus, the Agency was required to bargain after the Union withdrew its waiver. Exceptions at 14-17; *see also id.*, Jt. Ex. 5 at 3 (Union asserted that Agency terminated any "express or implied" waivers under parties' agreement once Agency terminated contract).

Parties may negotiate waivers of their right to bargain under the Statute. When parties agree to language that expressly waives the statutory right to bargain, the Authority will find that such language constitutes a waiver. *See, e.g., FAA*, 14 FLRA at 649, 645 n.1 (concluding that language stating that parties would "consult [rather than bargain] prior to implementing changes in personnel policies, practices and matters affecting working conditions" constituted a waiver). Because waivers of statutory rights constitute permissive subjects of bargaining, contractual provisions containing such waivers do not continue after the expiration of a parties' agreement unless the parties agree otherwise; as such, a party may reassert its bargaining rights.[4] *See id*. at 649.

In contrast to the above situation, the Authority will find that language in an agreement *does not* constitute a waiver of bargaining rights if the language does nothing more than permit a party to "act unilaterally." *IRS*, 37 FLRA at 1429 (finding that provisions that merely permitted agency to make lateral reassignments "did not constitute waiver[ ]" of union's statutory bargaining rights); *see also id.* at 1431-32 (citing *IRS*, *Denver Dist., Colo.*, 17 FLRA 192 (1985) (overruling portion of prior decision wherein Authority found that these same provisions constituted waiver of union's statutory bargaining rights). In the absence of express language waiving a party's right to bargain, the Authority will examine the underlying subject matter of a provision to determine whether it concerns a mandatory or permissive subject of bargaining. *See IRS*, 37 FLRA at 1430.

It is undisputed that the parties agreed to several provisions addressing agreements for seasonal employees and that those terms controlled their conditions of employment. However, the Union has cited no language in these provisions that states that the Union agreed to waive its rights to bargain under the Statute. Therefore, although these provisions allowed the Agency to act unilaterally with respect to agreements for seasonal employees, as noted above, under Authority precedent, that alone is insufficient to transform them into a waiver of the Union's statutory right to bargain. *See id.* at 1430-31.

Because the parties' agreement does not contain an express waiver of the Union's rights to bargain, we examine the provisions in question to determine whether they are mandatory or permissive subjects of bargaining. *See id.* at 1430. The parties agree that these provisions concern the conditions of employment of seasonal employees. Authority precedent is clear that provisions concerning conditions of employment are mandatory subjects of bargaining. *See, e.g., NTEU*, 64 FLRA 156, 157 (2009) (Member Beck dissenting as to other matters). Consequently, the provisions in dispute concern mandatory subjects of bargaining; as such, they remain in effect following the expiration of the parties' agreement. *See IRS*, 37 FLRA at 1430.

The decisions relied upon by the Union provide no basis for reaching a different conclusion. The Union relies primarily on *Customs*. As discussed above, in *IRS*, the Authority found that provisions that permitted the agency to act unilaterally did not constitute a waiver of bargaining rights, *see id.* at 1429-30; moreover, the Authority overruled a prior decision that reached the opposite conclusion. *See id.* at 1431-32. Based on this, it is clear that *Customs* -- wherein the Authority found that contractual language that permitted a party to act unilaterally constituted a waiver of the union's bargaining rights -- is inapplicable because it was decided pre-*IRS*. The Union does not contend that *IRS* was incorrectly decided; indeed, it does not even reference *IRS* in its exceptions despite the Arbitrator's clear reliance on this case. Moreover, the Union's reliance on *FAA* and *DOT* is similarly misplaced. In both of these decisions, the provision in question contained language that waived the union's right to bargain. *See DOT*, 16 FLRA at 480 (stating that parties would "consult" rather than bargain); *FAA*, 14 FLRA at 645 n.1 (same). As discussed above, such language is absent from the provisions in this case. Consequently, *FAA* and *DOT* also do not control here. *See IRS*, 37 FLRA at 1430 (distinguishing *DOT*).

Based on the foregoing, we find that the parties' agreement contains no contractual waiver of the Union's right to bargain. Moreover, we find that the provisions concerning seasonal employees are mandatory subjects of bargaining and, therefore,

4. Conditions of employment that are required to be maintained are specific conditions established pursuant to the parties' mutual obligation to negotiate over "mandatory" subjects of bargaining, and continue "to the maximum extent possible, following the expiration of agreement, in the absence of either an express agreement to the contrary or the modification of those conditions of employment in a manner consistent with the Statute." *FAA*, 14 FLRA at 647. Conversely, conditions concerning "permissive" subjects of bargaining, that is, "matters which are excepted from the obligation to negotiate by § 7106(b)(1) of the Statute" or which are "outside the required scope of bargaining under the Statute[,]" do not continue after the expiration of an agreement. Id. at 647-48.

remained in effect following the expiration of the parties' agreement.

2. The Agency did not violate § 7116(a)(1) and (5) of the Statute.

The Union asserts that the Arbitrator incorrectly concluded that the Agency did not violate § 7116(a)(1) and (5) of the Statute by failing to provide the Union with notice of its decision to change the length of seasons for seasonal employees' and an opportunity to bargain over the same. *See* Exceptions at 20-21. The Arbitrator concluded that the Agency did not have to provide the Union with notice and an opportunity to bargain because the Agency's changes were covered by the parties' agreement. *See* Award at 15, 16.

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. *U.S. Dep't of the Treasury, IRS, Denver, Colo.*, 60 FLRA 572, 573 (2005) (Chairman Cabaniss concurring) (citing *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 53 (2000) (*IRS, Denver*)). This doctrine excuses parties from bargaining on the ground that they have already bargained and reached agreement concerning the matter at issue. *U.S. Dep't of Health & Human Servs., SSA, 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. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). The second prong states that, 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 also may properly refuse to bargain over the matter. *Id*. at 813-14.

The parties do not dispute that their agreement contains several provisions addressing conditions of employment for seasonal employees or that these provisions allow the Agency to enter into individual employment agreements with these employees. Moreover, the Union does not contend that the Arbitrator improperly interpreted these provisions; rather, it incorrectly alleges that it was no longer bound by these provisions once it withdrew its bargaining "waiver." However, as discussed above, there was no waiver and these provisions remain in effect. These provisions expressly permit the Agency to enter into individual agreements with seasonal employees; consequently, the Agency did not have a duty to bargain. *See IRS, Denver*, 60 FLRA at 574 (agency had no duty to bargain where agreement expressly addressed union's proposal).

The Union also contends that the Arbitrator should not have reached the issue of whether the Agency's actions were covered-by the parties' agreement and that, in any event, this defense is "inapplicable." Exceptions at 4. The Union offers no explanation for either of these assertions. Consequently, they provide no basis for finding the award deficient.[5]

Based on the foregoing, we find that the Agency did not violate § 7116(a)(1) and (5) of the Statute.

B. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when they resolve an issue not submitted to arbitration. *U.S. Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 194 (1999). However, arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue, *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996), or by addressing an issue that necessarily arises from issues specifically included in a stipulation. *See Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue, or the arbitrator's formulation of an issue to be decided in the absence of a stipulation, the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999).

The Union contends that the Arbitrator exceeded his authority when he made the following finding:

> I am also unable to agree with [the Union] that [the Agency] nationwide, since July 11, 2006, has made "systemic" unilateral

[5] We note that the Union does not allege that an expired agreement cannot serve as the basis for a covered by defense. Consequently, we do not address this issue. However, in this regard, *see United States Border Patrol, Livermore Sector, Dublin, Cal.*, 58 FLRA 231, 233 (2002) (Chairman Cabaniss concurring) (then-Member Pope dissenting).

> changes in violation of 5 [U.S.C.] [§] 7116(a)(1) and (5) and Article 47 of the parties' [national agreement] when it effected changes in the seasonal employees' employment agreements.

Award at 14. The Union filed a national grievance alleging a violation of Article 47, Section 2.A of the parties' national agreement. That provision, in turn, pertains to changes in conditions of employment that are "[Agency]-wide in nature." *Id.* at 6. Further, the Union requested nationwide relief. Although none of the issues before the Arbitrator contained the word "systemic," the foregoing establishes that all of the issues clearly arose in the context of resolving whether the Agency had committed systemic violations of the Statute and the parties' national agreement. Read in the context of the record as a whole, the Arbitrator's finding that the Union failed to prove that the Agency made systemic unilateral changes reflects his interpretation of the three issues before him. *See SSA, Balt., Md.*, 57 FLRA 181, 183 (2001). Accordingly, we deny this exception.

VI. Decision

The Agency's motion to dismiss the Union's exceptions is denied. The Union's exceptions are denied.

APPENDIX

Article 22, "Work Schedules," of the parties' national agreement provides, in pertinent part:

> Section 2, Seasonal Employment,
>
> . . . .
>
> E.
> Seasonal employees will receive an employment agreement which will:
>
> 1. clearly define the position to which the employee is assigned;
> 2. define the season as closely as practicable so that an employee will have a reasonably clear idea of how much work he or she can expect during the year;
> 3. identify the months in which work opportunities will most likely occur;
> 4. explain that the sole determinants of the length of time an employee is in pay status are the availability of work and the employee's standing on the release and recall list established under Article 14 of this Agreement;
> 5. explain that the employee may be called for assignment of work outside the identified season and for other assignments consistent with law, regulations and the provisions of this Agreement for such assignments;
> 6. explain that life and health insurance benefits accruing to the employee are linked to the work schedule assigned and the duration of work achieved pursuant to Article 27, Section 13 of this Agreement; and
> 7. explain that unemployment compensation benefits will accrue to the employee according to applicable State law.
>
> F.
> 1. The Employer has determined that, to the maximum extent possible, and in an effort to maintain health insurance eligibility for as many seasonal employees as possible, it will assign seasonal employees who would otherwise be subject to release, and who may otherwise lose their health insurance eligibility, to other work within the Division for which they meet the minimum qualification requirements.

Exceptions, Jt. Ex. 1 at 83-84.

Article 27, "Health and Safety," of the parties' agreement provides, in pertinent part:

> Section 13
>
> When the Employer reasonably expects a seasonal employee to work the minimum period of time required by regulations to make the employee eligible for health benefits . . . the employee shall be entitled to such benefits from the date of such expectation.

Id. at 94.

Article 47, "Mid-Term Bargaining," of the parties' agreement provides, in pertinent part:

> Section 1, General Provisions
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> . . . .
>
> S.
> 1. Unless otherwise permitted by law, no changes will be implemented by the Employer until proper and timely notice has been provided to the Union, and all negotiations have been completed including any impasse proceedings.
>
> . . . .
>
> Section 2, National Bargaining
>
> A.
> Where either party proposes changes in conditions of employment that are Service-wide in nature (to include those matters that affect employees in one (1) or more Divisions in multiple geographic areas), it will consolidate those proposed changes and serve notice thereof on a quarterly basis. Such notice will be due within five (5) workdays of April 1, July 1, October 1, and January 1, of each year, respectively.

Id. at 146-47.