65 FLRA No. 156

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 302
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY
(Agency)

0-AR-4681

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DECISION

April 27, 2011

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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 Charles Feigenbaum 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.

The Arbitrator found that the Union's grievances were nonarbitrable based on the Authority's decision in *United States Department of Defense, National Imagery & Mapping Agency, St. Louis, Missouri*, 57 FLRA 837 (2002) (then-Member Pope dissenting) (*NIMA*).

For the reasons that follow, we reverse *NIMA*, and we set aside and remand the award to the parties for resubmission, absent settlement, to an arbitrator of their choice.

II. Background and Arbitrator's Award

An employee requested an Administratively Determined Pay Increase (ADPI) pursuant to the Agency's Policies and Procedures Manual (PPM) 3110-30.[2] When the Agency denied the request, the Union filed a grievance (the compensation grievance) alleging that the denial violated PPM 3110-30 and the parties' agreement. Award at 3. The grievance also requested certain information from the Agency pursuant to § 7114(b)(4) of the Statute.[3] In response, the Agency stated that ADPIs are "compensation tools[,]" and that "compensation issues are neither negotiable nor grievable as a matter of law" because, as the Authority held in *National Treasury Employees Union*, 59 FLRA 815, 816 (2004) (then-Member Pope dissenting), *pet. for review denied*, 435 F.3d 1049 (9th Cir. 2006) (*NTEU*), the Agency "has sole and exclusive discretion to determine such matters."[4] *Id.* As a result, the Agency stated that the Union's requested information was not "necessary for full and proper discussion, understanding and negotiation of matters falling within the scope of collective bargaining[,]" and it denied the information request. *Id.* The Union subsequently elaborated on its information request. *Id.* The Agency then denied the compensation grievance at step 1 of the parties' negotiated grievance procedure. *Id.* at 4.

Subsequently, the Union "raised the [compensation] grievance to step 2" of the parties' negotiated grievance procedure. *Id.* In so doing, the Union "disputed the Agency contention that the [compensation] grievance was a negotiation over compensation[,]" and stated that, instead, the grievance was about the Agency's "failure to

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

2. PPM 3110-30 sets forth the circumstances under which ADPIs will be granted. *See* Award at 2.

3. In pertinent part, § 7114(b)(4) of the Statute requires an agency to provide a union

> upon request, and to the extent not prohibited by law, data--
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> (A) which is normally maintained by the agency in the regular course of business;
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> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[] . . . .

4. The "sole and exclusive discretion" doctrine is discussed further below.

implement its stated policy on pay disparities that is clearly delineated in PPM 3110-30." *Id.* The Agency denied the compensation grievance at both steps 2 and 3 of the negotiated grievance procedure. *Id.* at 5. The Union also filed a separate grievance over the Agency's refusal to provide the requested information (the information request grievance). *Id.*

When the grievances were unresolved, they were submitted to arbitration, where the Arbitrator stated the issues as follows: "The [Authority] has ruled that, under 5 U.S.C. §§ 481 and 482,[5] the Agency has no duty to bargain with the Union over pay issues. Does this bar the Union from using the negotiated grievance and arbitration procedures to challenge compensation determinations made by [the Agency]?" *Id.* at 1-2.

The Arbitrator noted that, in *NTEU*, 59 FLRA 815, the Authority held that the Agency has sole and exclusive discretion to establish employees' compensation. Award at 11. The Arbitrator noted that the Union "d[id] not dispute this finding of non-negotiability over compensation[,]" and that the issue was "what the finding means with respect to the grievance and arbitration procedures." *Id.* at 11-12. The Arbitrator found that the Authority's decision in *NIMA*, 57 FLRA 837, was "key" to resolving that issue, Award at 12, and that *NIMA* held that "neither the grievance nor arbitration procedure may be used to challenge a management compensation decision[,]" *id.* at 13. Accordingly, the Arbitrator concluded that the compensation grievance was neither grievable nor arbitrable. *Id.* The Arbitrator then stated: "That being the case, the same applies to the [information request] grievance . . . ." *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to law. The Union "concedes that *NIMA* precludes grievances over compensation" at the Agency, but asserts that *NIMA* was "wrongly decided" and that the Authority should "revisit" that decision. Exceptions at 7. In this regard, the Union asserts that: *NIMA* "confused the bargaining procedure with the grievance procedure," *id.* at 8; parties often reach agreements over matters that are not within the duty to bargain; and grievances that seek to require agencies to comply with those agreements and the agencies' "own regulations" are arbitrable, *id.* at 9. According to the Union, that the Agency has sole and exclusive discretion to establish compensation "does not mean that [the Agency] has unfettered discretion to unfairly implement the compensation policies that it adopted." *Id.* at 8. The Union requests that the Authority set aside and remand the award, while ordering the Agency to respond to the Union's information request. *See id.* at 10.

B. Agency's Opposition

The Agency argues that the award is not contrary to law. Specifically, the Agency asserts that, because it has sole and exclusive discretion to establish its employees' compensation, the Arbitrator correctly found that the grievance was not arbitrable. Opp'n at 6. In addition, the Agency contends that it has not negotiated compensation matters with the Union, and that the parties' agreement "stat[es] the Agency's position that matters related to compensation are not subject to the negotiated grievance and arbitration procedure." *Id.* at 9.

IV. Analysis and Conclusions

The Union alleges that the award is contrary to law. The Authority reviews questions of law 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 a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

If a law indicates that an agency's discretion over a matter affecting employees' conditions of employment is intended to be "sole and exclusive," i.e., that it is intended to be exercised only by the agency, "then the agency is not obligated under the Statute to exercise that discretion through collective bargaining." *NTEU*, 59 FLRA at 816. In *NIMA*, the Authority held that an agency's sole and exclusive discretion to establish certain conditions of employment without bargaining also precludes grievances and arbitration over those conditions, once established. 57 FLRA at 842-43.

The Union argues that *NIMA* was wrongly decided and requests that the Authority reexamine that decision. For the reasons that follow, we agree. In so doing, we reject our dissenting colleague's view that reexamination of *NIMA* is not necessary because, even if *NIMA* was wrongly decided, the grievance is

5. The pertinent wording of §§ 481 and 482 is set forth below.

not arbitrable under the parties' agreement and PPM 3110-30. In this regard, the Arbitrator based his award solely on his interpretation of *NIMA;* he did not assess whether the grievance was nonarbitrable based on the parties' agreement, PPM 3110-30, or any other ground. It is well established that determining the meaning of an agreement is a matter for an arbitrator, rather than a de novo review by the Authority. *Cf. AFGE, Council 220*, 54 FLRA 156, 160 (1998) (remand to arbitrator appropriate where arbitrator failed to interpret potentially dispositive contract provision that appears to conflict with award). It also is well established that collective bargaining agreements, rather than agency regulations, govern the disposition of matters to which they both apply. *E.g., U.S. Dep't of the Treasury, IRS*, 64 FLRA 720, 722 (2010). Therefore, if the parties' agreement permits the grievance in this case, then any contrary terms in PPM 3110-30 are irrelevant. Further, if *NIMA* was correctly decided, then there would be no basis to remand for interpretation of the parties' agreement. As such, we reexamine *NIMA*.

In resolving this issue, two lines of Authority precedent are relevant. The first line of relevant Authority precedent involves the scope of negotiated grievance procedures. Section 7121 of the Statute provides, with certain exceptions not relevant here, that the negotiated grievance procedure "shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a)(1). The Authority has held that "Congress intended that '[a]ll matters that under the provisions of law could be submitted to the grievance procedures shall in fact be within the scope of any grievance procedures negotiated by the parties unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures.'" *NTEU, Chapter 15*, 33 FLRA 229, 236 (1988) (quoting Joint Explanatory Statement of the Committee on Conference, H.R. Rep. No. 1717, 95th Cong. 2d Sess., 157, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2891)).

A law may expressly preclude grievances over a particular subject matter. *See, e.g.*, 5 U.S.C. § 7121(c) (excluding certain matters from the scope of the grievance procedure). In addition, a law may create an exclusive appeals procedure with regard to certain matters and thereby preclude the use of the negotiated grievance procedure to challenge those matters. "[W]here laws other than the Statute limit the scope of negotiated grievance procedures, there have been clear, specific indications that the statutory procedures were intended to be exclusive." *AFGE, Local 3258*, 53 FLRA 1320, 1325 (1998) (citations omitted) (*Local 3258*). In this connection, "where the exclusivity of an appeals procedure concerning certain challenges to an agency's conditions of employment decision is not established by the plain wording of a law, or its accompanying legislative history, the Authority has found that the negotiated grievance process is available." *Id.* at 1327. For example, "[w]here a statute states that an appeals procedure takes effect 'notwithstanding' any other law, such a statute constitutes a clear, specific indication that the statutory procedure is intended to be exclusive." *Id.* at 1326. In addition, "[e]ven where a law or regulation does not use such 'notwithstanding' language, the Authority will find matters excluded from the negotiated grievance process if the expressed intent to do so is unmistakable." *Id.*

Applying the first line of precedent here, 12 U.S.C. § 481 pertinently provides that the Comptroller shall employ certain individuals "without regard to the provisions of other laws applicable to officers or employees of the United States[,]" and 12 U.S.C. § 482 pertinently provides that, "[n]otwithstanding any of the provisions of [§] 481 . . . to the contrary, the Comptroller . . . shall fix the compensation . . . of, and appoint and direct, all employees of the Office of the Comptroller of the Currency."[6] Neither § 481 nor § 482 states that matters concerning compensation are excluded from negotiated grievance procedures. In addition, neither § 481 nor § 482 creates an exclusive procedure -- or *any* procedure, for that matter -- for appealing applications of the Agency's established compensation policy. Thus, the first line of Authority precedent lends support to a conclusion that individual applications of the Agency's established compensation system are subject to the parties' negotiated grievance procedure.

The second line of relevant Authority precedent involves the difference between the scope of bargaining and the enforceability of agreements -- including the use of the negotiated grievance

6. We note that §§ 481 and 482 have been amended to provide that the Agency's authority to fix compensation is "subject to chapter 71 of title 5, United States Code[.]" Dodd-Frank Wall Street Reform and Consumer Prot. Act, Pub. L. No. 111-203, § 318, 124 Stat. 1326 (2010). However, the amended wording is not yet effective. *See id.* at §§ 318(e) & 311(a) (effective date of § 318 is "the transfer date[,]" defined in § 311 as "1 year after the date of enactment of this Act[,]" which was July 21, 2010). In addition, there is no dispute that the pre-amendment wording applies here.

procedure to enforce those agreements. In this regard, it is well established that although a particular matter may be outside the duty to bargain as a permissive subject, if the parties reach an agreement over such a matter, then the agreement is enforceable in arbitration. *See, e.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 393, 395 (2000), *reconsid. denied*, 56 FLRA 935 (2000) (contract provisions involving permissive subjects under § 7106(b)(1) of the Statute are enforceable in arbitration); *AFGE, Local 3302*, 52 FLRA 677, 680-83 (1996) (Member Armendariz concurring) (contract provisions involving matters that are not conditions of employment, and thus permissive subjects, are enforceable in arbitration). Further, federal employment is governed by a host of laws and government-wide regulations that establish various conditions of employment. For example, it is well established that most federal employees are not entitled to bargain over their wage rates because those rates are established by law. *E.g., Fraternal Order of Police, Lodge # 1F*, 57 FLRA 373, 383 (2001) (wage rates of General Schedule employees are outside the duty to bargain). Nevertheless, grievances regularly are filed regarding agencies' alleged misapplication of established wage rates. *E.g., U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Operating Div.*, 65 FLRA 23, 23 (2010) (grievance challenged agency's calculation of grievant's rate of pay upon her permanent promotion); *U.S. Dep't of the Treasury, IRS, Okla. City, Okla.*, 64 FLRA 615, 615 (2010) (grievance alleged improper termination of grievant's grade and pay retention). Therefore, there is a meaningful difference between what an agency is required to bargain over and what is grievable under a negotiated grievance procedure.

Applying that second line of precedent here, there is no dispute that the Agency had sole and exclusive discretion to establish employee compensation without bargaining. However, the mere fact that the Agency had no duty to *bargain* over compensation does not compel a conclusion that alleged misapplications of the Agency's established compensation system in PPM 3110-30 are not *grievable*. In this regard, there is no dispute that PPM 3110-30 is an Agency regulation. The Authority has held that "unless there is a specific exclusion in the agreement, a grievance concerning a violation of an agency regulation . . . is arbitrable under negotiated grievance procedures." *U.S. Dep't of the Treasury, IRS, Louisville Dist.*, 36 FLRA 375, 380 (1990). Thus, unless the parties' negotiated grievance procedure excludes alleged violations of PPM 3110-30 from its coverage -- a matter that the Arbitrator did not reach, because he relied solely on *NIMA* -- such alleged violations would be included within the scope of the negotiated grievance procedure. In addition, the compensation grievance alleged a violation of not only PPM 3110-30, but also the parties' agreement. Award at 3. For these reasons, the second line of Authority precedent also lends support to a conclusion that §§ 481 and 482 do not preclude the compensation grievance.

In *NIMA*, the Authority stated that it would be "incongruous" for Congress to give sole and exclusive discretion over a matter without also precluding grievances over that matter, and that "the more compelling and reasonable statutory construction" of the statutory wording at issue in *NIMA* was to preclude such grievances. 57 FLRA at 842. For support, the Authority cited: *Colorado Nurses Ass'n v. FLRA*, 851 F.2d 1486 (D.C. Cir. 1988) (*Colorado Nurses*); *NTEU v. FLRA*, 848 F.2d 1273 (D.C. Cir. 1988); *Local 3258*, 53 FLRA 1320; and *U.S. Dep't of Veterans Affairs, Med. Ctr., Danville, Ill.*, 34 FLRA 131, 134-35 (1990) (*VAMC Danville*).

However, the Authority did not address in *NIMA* the two lines of precedent discussed above or explain how its decision was consistent with that precedent. Moreover, the decisions on which the Authority relied do not support a conclusion that sole and exclusive discretion to establish a particular matter precludes grievances over that matter. In this regard, *Colorado Nurses* and *VAMC Danville* involved the application of title 38 of the United States Code, "an independent personnel system that . . . is exempt from all laws governing the terms and conditions of federal employment except as otherwise explicitly provided in" title 38. *Colorado Nurses*, 851 F.2d at 1489. By contrast, neither the laws at issue in *NIMA* nor the laws at issue here involve such an independent personnel system. In *Local 3258*, the Authority actually found that a particular matter was *not* barred from a negotiated grievance procedure, *see* 53 FLRA at 1327-30; thus, that decision did not support the Authority's conclusion in *NIMA*.[7]

7. We note that, in *Local 3258*, the Authority characterized *Illinois National Guard v. FLRA*, 854 F.2d 1396, 1402 (D.C. Cir. 1988) (*Ill. Nat'l Guard*), as holding that matters over which an agency head has sole and exclusive discretion may not be covered by a negotiated grievance procedure. However, *Ill. Nat'l Guard* addressed only the duty to bargain over union proposals regarding compressed work schedules, not whether a matter was grievable. Thus, *Ill. Nat'l Guard* also did not support the Authority's conclusion in *NIMA*.

Finally, in *NTEU v. FLRA*, the court found that allowing probationary employees to use the negotiated grievance procedure to challenge their discharges would be contrary to law because, according to the court, the Civil Service Reform Act "affirmatively intended agencies to retain the power to summarily terminate probationary employees[,]" and that Office of Personnel Management regulations allowed agencies to dismiss probationary employees "with only written notice and a brief statement of reasons, . . . and an exceedingly limited right to appeal[] . . . ." 848 F.2d at 1275. Here, by contrast, there are no statutory or regulatory provisions that either indicate that Agency applications of its established compensation system are not subject to review or specifically set out limited procedures for such review.

In sum, two lines of Authority precedent support conclusions that: (1) sole and exclusive discretion to establish certain conditions of employment does not preclude grievances over individual applications of those conditions of employment, once established; and (2) in reaching a contrary conclusion in *NIMA*, the Authority erred. Thus, we reverse *NIMA* and conclude that nothing in the Agency's sole and exclusive discretion to establish compensation precludes grievances over individual application of the Agency's established compensation system. Consequently, we set aside the award.

Where the Authority sets aside an arbitrator's determination that a grievance is not arbitrable, the Authority remands the matter to the parties for submission, absent settlement, to an arbitrator of their choice. *E.g.*, *AFGE, Local 2823*, 64 FLRA 1144, 1147 (2010). In those circumstances, the Authority also has declined to resolve additional arguments raised by parties. *See id.* (declining to order arbitrator to resolve merits of grievance because arbitrator could find grievance nonarbitrable on other grounds).

Here, the Union requests that the Authority order the Agency to provide the information that the Union requested -- in effect, requesting that the Authority resolve the merits of the information request grievance. The Arbitrator based his dismissal of that grievance solely on his finding that, as a result of *NIMA*, the compensation grievance was not arbitrable. As such, he did not address the merits of the information request grievance, including whether the information requests satisfied the requirements of § 7114(b)(4) of the Statute. Consistent with the foregoing precedent, we decline the Union's request to order the Agency to provide the information and, instead, remand the award to the parties for resubmission, absent settlement, to an arbitrator of their choice.[8]

V. Decision

The award is set aside and remanded to the parties for resubmission, absent settlement, to an arbitrator of their choice.

8. We note that nothing in this decision precludes an arbitrator from finding, on remand, that the grievance is nonarbitrable for reasons other than those set forth in *NIMA*.

Member Beck, Dissenting:

In light of the controlling statutory language, I cannot agree with my colleagues that the Comptroller's compensation decisions are subject to the grievance and arbitration procedure contemplated by our Statute.

The law provides, plainly and without qualification, that:

> the employment and compensation of . . . employees of the office of the Comptroller of the Currency . . . shall be *without regard to the provisions of other laws applicable to officers or employees of the United States.*

12 U.S.C. § 481 (emphasis added).

Unless one disagrees with the proposition that our Statute is a law applicable to employees of the United States, one must conclude that the Comptroller's compensation decisions are not subject to the coverage of our Statute. If the Comptroller's compensation decisions are not subject to the coverage of our Statute, then, *a fortiori*, they are not subject to the grievance and arbitration procedures that exist pursuant to our Statute.

The Comptroller might have agreed contractually to subject his compensation decisions to arbitral review, but he expressly declined to do so, stating in the CBA that:

> The Employer and Union disagree over whether matters related to compensation and benefits are subject to the grievance and arbitration procedure. It is the Employer's position that these matters are not subject to the negotiated grievance and arbitration procedure, as a matter of law . . . 12 USC 481, to set compensation "without regard to the provisions of other laws applicable to officers or employees of the United States."

Opp'n, Agency Ex.1, parties' agreement at 123 (Article 27, Section 1(A)(4) n.*).

Further, even the Agency policy upon which the Union relies explicitly provides that matters involving "[e]mployee compensation and decisions affecting permanent increases to employee base pay . . . *are not grievable* . . . [including], for example, the receipt of an *ADPI* . . ." Exceptions, Attach. 14, PPM 3110-30 at 3 (emphasis added).

The Union argues that we should reconsider *NIMA*, but fails to demonstrate that a different application of *NIMA* would result in a different outcome given the unambiguous language contained in the Agency's policy and the CBA. Exceptions at 6-10; *see NAGE, Local R1-109*, 61 FLRA 588, 591 (2006) (excepting party must establish that reconsideration of Authority precedent is "warranted"); *AFGE, Local 217*, 60 FLRA 459, 460 (2004) (union exception that does not demonstrate how award violates regulation is a bare assertion); *U.S. Dep't of the Army, Corps of Eng'rs Nw. Div., Portland Dist., Portland, Or.*, 59 FLRA 86, 88 (2003) (Member Armendariz dissenting) (excepting party bears burden to establish that award is inconsistent with regulatory language); *U.S. Dep't of the Navy, Naval Air Station, Jacksonville, Fla.*, 61 FLRA 139, 142 (2005) and *VA Med. Ctr., Long Beach, Cal.*, 41 FLRA 1370, 1380 (1991) ((excepting party must demonstrate that reconsideration of precedent is "require[d]").)

Therefore, it is unnecessary for us to re-examine our precedent in *NIMA* in order to resolve this case.