**65 FLRA No. 168**

UNITED STATES
DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 245
(Union)

0-AR-4697

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DECISION

May 11, 2011

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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 George E. Marshall 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 Arbitrator determined that the Agency violated the parties' agreement, law, rule, and regulation when it changed its compensatory time policy to comply with 5 C.F.R. § 550.114 (§ 550.114). For the reasons discussed below, we grant the Agency's exceptions in part and deny them in part. In addition, we set aside the award to the extent that it applies to the period of time after the parties' agreement expired on January 19, 2008, and set aside the Arbitrator's direction to the Agency to reinstate its old compensatory time policy.

## II. Background and Arbitrator's Award

The Agency had a policy (the old policy) that allowed employees to "carry over" up to eighty hours of compensatory time from "one year to the next" for an indefinite amount of time, Award at 2, in accordance with Article 18 of the parties' agreement,[1] *id.* at 1. In March 2007, the Office of Personnel Management revised § 550.114, which pertains to the use of compensatory time. *See* 72 Fed. Reg. 12032, 12035-36 (2007). The revised § 550.114 states, in pertinent part, that an employee "must use accrued compensatory time off . . . by the end of the 26th pay period after the pay period during which it was earned." 5 C.F.R. § 550.114(d). In November 2007, in order to comply with the revised § 550.114, the Agency replaced the old policy with a new compensatory time policy (the new policy). *See* Award at 2. Under the new policy, the Agency no longer allowed employees to carry over compensatory time indefinitely. *See id.* The Union filed a grievance challenging the new policy, and the grievance was unresolved and submitted to arbitration. *See id.* at 1.

The Arbitrator found that § 550.114 conflicted with the parties' agreement because § 550.114 would "prevent employees from carrying earned compensatory time forward for an indefinite period of time[.]" *Id.* at 2. The Arbitrator also found that the Agency was required to maintain the old policy, set forth in the parties' agreement, because the agreement existed before § 550.114 was implemented. *Id.* at 1-2. In this regard, the Arbitrator stated that the Agency could have terminated the agreement, but that the Agency did not notify the Union of its intent to do so, as required by the parties' agreement. *See id.* at 2 (citing *U.S. Dep't of the Army, Headquarters III Corps & Fort Hood, Tex.*, 40 FLRA 636 (1991) (*Fort Hood*)). According to the Arbitrator, the parties' agreement "expired and automatically renewed" on January 19, 2008. *Id.* at 2. Additionally, the Arbitrator found that under Article 3 of the agreement, "[a]ll past practices not in conflict with [the parties' agreement] shall continue, absent written notification by either party of their intent to discontinue or modify a particular practice."[2] *Id.* at 2-3. The Arbitrator determined that there was "no evidence in this record of such a notice being given." *Id.* at 3.

1. Article 18 of the parties' agreement states, in pertinent part, that an employee may not "carry forward more than . . . [eighty] hours of compensatory time . . . from one fiscal year to the next." Exceptions, Jt. Exs., Attach. 3 at 56.

2. Article 3 of the parties' agreement states, in pertinent part: "Past practices not in conflict with this Agreement shall continue, absent written notification by either party of their intent to discontinue or modify a particular practice." Exceptions, Jt. Exs., Attach. 3 at 6.

Based on the foregoing, the Arbitrator sustained the grievance and directed the Agency to rescind the new policy and to reinstate the old policy. *See id.* Additionally, the Arbitrator stated that employees who were adversely affected by the implementation should be made whole.[3] *Id.* The Arbitrator remanded the matter to the parties to determine which employees were adversely affected by the Agency's actions, and he retained jurisdiction to assist in the implementation of the remedies. *Id.*

## III. Positions of the Parties

### A. Agency's Exceptions

The Agency asserts that the Arbitrator erred as a matter of law when he determined that the Agency had not provided written notification of its intent to modify its compensatory time policy, pursuant to Article 3 of the parties' agreement. *See* Exceptions at 11 (citing *U.S. Dep't of Def., Def. Commissary Agency, Peterson Air Force Base, Colo. Springs, Colo.*, 61 FLRA 688, 692 (2006) (*Peterson AFB*)). Additionally, the Agency argues that the award is contrary to Authority precedent indicating that an agency may implement a government-wide regulation once the agreement with which the regulation conflicts has expired. *See* Exceptions at 9 (citing *GSA, Nat'l Capital Region*, 42 FLRA 121, 131 (1991) (*GSA*); *Fort Hood*, 40 FLRA at 641; *U.S. Dep't of Def., Def. Contract Audit Agency, Cent. Region*, 37 FLRA 1218, 1228 (1990) (*DCAA*)). The Agency claims in this regard that "[t]o the extent the Agency erred, it erred only in applying [§ 550.114] before" the agreement expired on January 19, 2008. *Id.* at 10. Further, the Agency contends that reinstating the old policy would conflict with § 550.114. *See id.* at 13-14.

### B. Union's Opposition

The Union contends that the Agency's argument regarding notice should not be considered because the Agency "failed to raise the issue of timely notice" in its post-hearing brief. Opp'n at 12 (citing 5 C.F.R. § 2429.5 (§ 2429.5)).[4] Additionally, the Union argues that the Arbitrator's determination that the Agency was required to continue to follow the old policy is consistent with 5 U.S.C. § 7116(a)(7) (§ 7116(a)(7)).[5] *See id.* at 7-8. In response to the Agency's claim that the Agency did not violate § 7116(a)(7) once the parties' agreement expired, the Union argues that this is "very much in dispute" because the "plain language of the [parties' agreement] does not mention expir[ation]." *Id.* at 9.

## IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and 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.*

Preliminarily, we address the Union's claim that the Agency's argument regarding notice should be dismissed under § 2429.5. Section 2429.5 provides, in pertinent part, that the Authority will not consider any "evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5. *See also* 5 C.F.R. § 2425.4(c) (exceptions may not rely on any "evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator"). Here, the Agency asserted, in its post-hearing brief to the Arbitrator, that it notified the Union of its intent to implement the new policy. *See* Exceptions, Attach., Agency's Post-Hearing Brief at 6 ("[T]he Agency notified the unions . . . of its intended implementation of a comp time policy in compliance with the new regulation."). Further, the notice-related argument in the Agency's exceptions is based on evidence presented at arbitration. *See* Exceptions at 12. *Accord* Exceptions, Jt. Exs., Attach. 5 (Agency newsletter announcing new policy); Exceptions, Attach., Hr'g Tr. at 133, 137 (testimony regarding newsletter announcement). Thus, there is evidence that the Agency presented its argument regarding notice to the Arbitrator. Accordingly, we consider the Agency's argument.

3. Specifically, the Arbitrator stated that the remedy should include, but not be limited to, "[r]estoration and credit for any forfeited time" and "[p]ay for . . . employees who have separated from [the Agency] for unused compensatory time" that was forfeited. Award at 3. Additionally, the Arbitrator directed the Agency to post a cease and desist notice "concerning its violation." *Id.*

4. The pertinent wording of § 2429.5 is set forth below.

5. The pertinent wording of § 7116(a)(7) is set forth below.

With regard to the merits of that argument, the Authority has rejected as "misplaced" exceptions to an arbitrator's contract interpretation that challenge the arbitrator's interpretation of law. *Int'l Fed'n of Prof'l & Technical Engr's*, 65 FLRA 167, 169 (2010) (finding misplaced a contrary to law exception challenging arbitrator's interpretation of parties' agreement). *See also AFGE, Local 779*, 64 FLRA 672, 674 (2010) (same). *Cf. U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 354 (2005) (Authority's unfair labor practice precedent irrelevant where arbitrator's award was limited to finding agency's notice of a reduction in force violated parties' agreement). Here, the Arbitrator interpreted and applied Article 3 of the parties' agreement to find that the Agency did not notify the Union that the Agency intended to change its compensatory time policy.[6] *See* Award at 2-3. Although the Agency claims that this finding is contrary to *Peterson AFB*, in which the Authority determined that an agency satisfied its *statutory* obligation to provide sufficient notice of a change, *see* 61 FLRA at 692-93, here the Arbitrator found only that the Agency did not satisfy its *contractual* obligations under the parties' agreement, *see* Award at 2-3. In this connection, the Authority has held that parties may negotiate contractual entitlements that are greater than statutory entitlements. *See United Am. Nurses, D.C. Nurses Ass'n & United Am. Nurses, Local 203*, 64 FLRA 879, 882 (2010) (entitlement to information under § 7114(b)(4) of the Statute is a "statutory floor and not a ceiling."). Also in this connection, the Authority has held that parties may agree to, and arbitrators may enforce, contract provisions requiring an agency to provide notification of various matters. *U.S. Dep't of Def., the Adjutant Gen., Nat'l Guard Bureau, Tenn. Air Nat'l Guard*, 56 FLRA 588, 591 (2000). Accordingly, the Agency's reliance on the statutory standard for adequate notice is misplaced and does not demonstrate that the Arbitrator erred as a matter of law by finding that the Agency failed to provide notice as required by the parties' agreement. Thus, we deny this exception.

With regard to the argument regarding the new policy's implementation, § 7116(a)(7) of the Statute states, in pertinent part, that it is an unfair labor practice for an agency to "enforce any . . . regulation . . . which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the . . . regulation was prescribed[.]" 5 U.S.C. § 7116(a)(7). The Authority interprets and applies § 7116(a)(7) "narrowly." *Fort Hood*, 40 FLRA at 641. Accordingly, provisions in a collective bargaining agreement "control over conflicting [g]overnment-wide regulations 'for the express term of the agreement during which the [g]overnment-wide regulation was first prescribed, *but no longer.*'" *Id.* (quoting *DCAA*, 37 FLRA at 1228) (emphasis added). Once a government-wide regulation that conflicts with a preexisting agreement is implemented, the government-wide regulation becomes enforceable by operation of law when the agreement expires. *See id.*

Here, the Arbitrator found that the parties' agreement expired on January 19, 2008.[7] *See* Award at 1-2. At that time, § 550.114 became enforceable by operation of law. *See Fort Hood*, 40 FLRA at 641. *See also GSA*, 42 FLRA at 131; *DCAA*, 37 FLRA at 1228. As such, the Arbitrator's conclusion that the Agency could not modify its compensatory time policy to comply with § 550.114, is contrary to Authority precedent insofar as it applies to the time after January 19, 2008. *See Fort Hood*, 40 FLRA at 642. Further, because the old policy conflicts with § 550.114, the Arbitrator's direction to reinstate that policy is contrary to § 550.114. *See SSA, Office of Disability Adjudication & Review*, 65 FLRA 477, 480 (2011) (setting aside award conflicting with government-wide regulations). Accordingly, we set aside the award to the extent that it applies to the period of time after the parties' agreement expired on January 19, 2008, and set aside the Arbitrator's direction to reinstate the old policy.

## V. Decision

The Agency's exceptions are granted in part and denied in part. The award is set aside to the extent that it applies to the period of time after the parties' agreement expired on January 19, 2008, and the Arbitrator's direction to the Agency to reinstate the old policy is set aside.

6. We note that the Agency does not claim that the award fails to draw its essence from the parties' agreement, or that the Arbitrator's findings are based on nonfacts. *See* Exceptions at 11-13.

7. We note that the Union claims that this finding is "in dispute" because the agreement "does not mention expir[ation][.]" Opp'n at 9. To the extent that the Union's claim constitutes an exception to the award, the exception is untimely because the Union's opposition was not filed within thirty days of the service of the award. *See* 5 C.F.R. § 2425.2.