65 FLRA No. 179

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 164
(Union)

0-AR-4437

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DECISION

May 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 Kenneth Cloke 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 Union filed a grievance alleging that the Agency improperly failed to bargain over a change in leave policy. The Arbitrator found that the Agency had a duty to bargain with the Union over the impact and implementation of the change,[2] and directed the Agency to bargain with the Union.

For the reasons that follow, we find that the award is deficient and set it aside.

II. Background and Arbitrator's Award

Prior to the events giving rise to the award in this case, the Agency implemented a Revised National Inspectional Assignment Policy (RNIAP), Award at 2, which states the Agency's election to: (1) cease negotiating with the Union over permissive subjects of bargaining under the Statute, *id.* at 7; (2) revoke any prior election to bargain at the local level, *id.* at 18; and (3) expressly override and replace any conflicting "'agreements, policies, documents or practices executed or applied by the parties previously, at either the national or local levels[,]'" *id.* at 24 (quoting RNIAP) (emphasis omitted). In regard to staffing levels, the RNIAP provides, in pertinent part, that "'[t]he number of personnel assigned to any inspectional activity, regardless of whether it is performed on a regular or overtime basis, on a regular workday or holiday, shall be determined by [A]gency managers to meet the operational needs and budgetary concerns.'" *Id.* at 8. The RNIAP also provides that "'[m]anagers will determine the number of employees that will be on leave during any scheduling period.'" *Id.* at 18.

The Agency reduced the number of employees who could qualify for short draw annual leave slots,[3] *id.* at 8, and the Union filed a grievance, which was unresolved and submitted to arbitration, *id.* at 2. Because the parties were unable to agree on a statement of the issues, the Arbitrator framed the issues as follows: "Did the [Agency] violate the [parties' agreement] or the . . . RNIAP . . . when it unilaterally reduced the number of short [draw] leave . . . slots available for bid by bargaining unit employees? . . . If so, what is the appropriate remedy?" *Id.* at 4.

Before the Arbitrator, the Union asserted that the Agency's reduction of short draw leave slots constituted a change in the parties' "established past practice" by which a one-to-one ratio of short draw to long draw leave slots was maintained. *Id.* at 16. The Union argued that it had sought to bargain over the "substance," as well as the "impact[] and implementation," of the Agency's reduction in the number of short draw leave slots. *Id.* at 9. The Union asserted that "[i]f the Agency had indicated

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

2. As discussed *infra*, the Arbitrator denied the grievance as to the Agency's refusal to bargain over the substance of the change. *See* Award at 19, 25, 27-28. No exceptions were filed to this finding.

3. Annual leave includes "short draw" leave, which is for leave before, during, and after Thanksgiving, Christmas, and New Year's days, and "regular" or "long draw" leave, which is any other leave during the year. Award at 8. The Agency determines the number of people who can apply for "short draw" and "long draw" leave slots, and the Union administers the bid rotation that determines which employees receive the available slots. *Id.*

that this was a national issue, the [n]ational Union would have delegated bargaining to the local[,]" *id.* at 13, and that "even if [the] RNIAP preclude[d] local bargaining over local changes, it d[id] not eliminate the need of the Agency to bargain nationally[,]" *id.* at 24.

In response, the Agency argued that staffing levels – including the number of employees that may use leave on a given day – are "within management discretion based on the [RNIAP]." *Id.* at 16. According to the Agency, "[a]ll of the Union's attempts to negotiate were at a local level and there is no requirement to bargain locally on the determination of how many leave slots would be available." *Id.* at 16-17.

The Arbitrator found that the Agency's reduction in the number of short draw leave slots did not violate the parties' agreement or the RNIAP, regardless of the alleged past practice of maintaining a one-to-one ratio between the types of leave draw slots. *Id.* at 25, 27-28. In this regard, the Arbitrator stated that "setting aside the issue of impact and implementation," the short draw leave issues, including the issue of "whether short draw slots ought to be matched one-to-one with regular slots[,]" "are entirely local and were consistently treated that way by both sides." *See id.* at 25. Thus, the Arbitrator concluded that "the parties['] past practice regarding the ratio of regular to short draw leave slots represented a local practice that was overturned or bypassed by RNIAP." *Id.*

Although the Arbitrator found that the RNIAP relieved the Agency of its obligation to bargain over the substance of its decision to reduce the number of short draw leave slots, he also found that the RNIAP did not relieve the Agency of its obligation to bargain over the impact and implementation of its decision. *Id.* at 27. Accordingly, the Arbitrator directed the Agency to "meet and bargain with the Union over these issues at the Union's request." *Id.* at 28. In so doing, the Arbitrator did not address the Agency's argument that the Union's only attempts to bargain were below the level of recognition.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the portion of the award directing the Agency to bargain over the impact and implementation of its reduction in short draw leave slots is contrary to law because "there is no requirement to bargain, at the local level, inspectional assignment actions taken by the Agency under [the] RNIAP." Exceptions at 15. Citing the Arbitrator's statement that "'setting aside the issue of impact and implementation, the issues are entirely local and *were consistently treated that way by both sides*[,]'" *id.* at 16 (quoting Award at 25) (emphasis added by Agency), the Agency argues that where, as here, "there has been a factual finding that the only attempts to bargain impact and implementation of RNIAP-based actions were made, and refused, at the local level, the Authority has previously found that the Agency's obligation to bargain at the national level was not properly at issue[,]" *id.* (citing *NTEU, Chapter 137*, 61 FLRA 413, 416 (2005)). The Agency also argues that because the Arbitrator's direction to the parties to bargain "does not specifically exclude local bargaining, . . . it should be set aside as contrary to law." *Id.* at 15. Finally, the Agency argues that the Arbitrator exceeded his authority by reaching the issue of whether the Agency was obligated to bargain over the impact and implementation of its reduction in the number of short draw leave slots. *Id.* at 9-14.

B. Union's Opposition

The Union argues that the award is not contrary to law because both the Union and the Agency consistently treated the reduction in short draw leave slots as a local issue. *See* Opp'n at 11-12. In this regard, the Union argues that evidence at arbitration "clearly indicate[d] that had management asserted that the change in leave policy could only be bargained at the level of recognition, the Union was prepared to refer the matter to [the national Union] for further action." *Id.* at 11. However, according to the Union, the Agency's failure to respond to the Union's bargaining requests by referring to the RNIAP or asserting that the Union was attempting to bargain below the level of recognition makes the Arbitrator's award lawful and the precedent cited by the Agency distinguishable. *Id.* at 11-12. In addition, the Union argues that "[s]hould the Authority agree with the Agency[] . . . that an order of local bargaining is inappropriate in this case, the remedy can be clarified to require bargaining only at the level of recognition." *Id.* at 13. Finally, the Union argues that the Arbitrator did not exceed his authority. *Id.* at 6-10.

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an 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 a de novo standard of review, the Authority assesses 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 assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Agency argues that because the Union's only attempts to bargain were at the local level, the Agency lawfully refused to bargain the impact and implementation of its reduction in short draw leave slots. *See* Exceptions at 16-17. In this regard, the Authority has repeatedly upheld the Agency's implementation of the RNIAP, which, as it relates to inspectional assignment matters, "terminated the Agency's obligation to bargain at the local level over such matters." *NTEU, Chapter 137*, 60 FLRA 483, 487 (2004) (*Chapter 137*) (Chairman Cabaniss concurring), *recons. denied*, 61 FLRA 60 (2005), *pet. for review dismissed sub nom. NTEU v. FLRA*, No. 05-1338, 2006 WL 2521320 (D.C. Cir. Aug. 14, 2006). *See also NTEU, Chapter 143*, 60 FLRA 922, 927-28 (2005) (*Chapter 143*) (Chairman Cabaniss concurring) (finding no obligation to bargain at the local level over the impact and implementation of assignment-policy changes) *pet. for review denied sub nom. NTEU v. FLRA*, 453 F.3d 506 (D.C. Cir. 2006); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 60 FLRA 496, 499-500 (2004) (*DHS*) (Chairman Cabaniss dissenting) (same). Consistent with this precedent, the Agency did not violate the Statute if the Union attempted to bargain over the reduction in short draw leave slots only at the local level.

The Union does not dispute the Agency's argument that the Union attempted to bargain only at the local level. *See* Exceptions at 16-17. *See also* Award at 16-17. The Union claims only that it was *prepared* to bargain at the national level – not that it actually attempted to do so. In this regard, the Union asserts that the evidence at arbitration showed that "*had* management asserted that the change in leave policy could only be bargained at the level of recognition, the Union *was prepared* to refer the matter to National [Union] for further action." Opp'n at 11 (emphasis added). In support of this statement, the Union cites letters that the Union sent to local management notifying the Agency, as required by the parties' collective bargaining agreement, of the designated local Union stewards that the Agency should contact in the event of "intended changes in operational or administrative procedures impacting on employees[.]" Opp'n, Attach. 3 at 1 & 3 (emphasis omitted). These letters include the following statement:

> To the extent that [the Agency] believes that [its] bargaining obligation is only at the national level, please forward Article 37 notice to whomever you believe is the appropriate Agency representative at the national level and so advise [local Union] officers, so we can alert our national representative . . . and bargaining can occur at that level.[4]

Id. at 1, 3.

The foregoing letters do not refer to any particular subject of bargaining, including the Agency's reduction in short draw leave slots. Thus, the Union has not demonstrated that the letters constitute requests to bargain the reduction in short draw leave slots at the national level. Further, the Agency's implementation of the RNIAP informed the Union that the Agency was withdrawing any previously delegated authority to bargain assignment matters – including leave – at the local level. Award at 18. The Union cites no basis for concluding that the Agency was required to treat a request to bargain locally as a request to bargain at the national level.

The Arbitrator made no finding that the Union ever attempted to bargain at the national level, and the Union does not argue, or cite to any evidence, that it did so.[5] Because the Agency had no obligation to bargain at the local level, and the Union has not established that it attempted to bargain at anything other than the local level, Authority precedent supports a conclusion that the award is deficient. *See Chapter 143*, 60 FLRA at 927-28; *DHS*, 60 FLRA at 500; *Chapter 137*, 60 FLRA at 488.

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4. The record does not include a copy of Article 37 of the parties' agreement.

5. In this regard, the dissent appears to find that, by informing the Agency of the Union's national-level contact, the Union was requesting to bargain at the national level. Dissent at 7. However, there is no basis for finding that, by providing contact information, the Union was requesting to bargain nationally over all subsequent changes in conditions of employment. Further, whether or not the Agency's "main argument before the Arbitrator" was that it had no obligation to bargain "at all," *id.*, the Agency also argued to the Arbitrator, as it does to the Authority, that the Union failed to request bargaining at any level other than the local level. Award at 16-17; Exceptions at 16-17. Thus, the Union's failure to request bargaining at the national level was before the Arbitrator, and is before the Authority.

The Union also cites no basis for concluding that the lawfulness of the Agency's refusal to bargain depends upon the reasoning that the Agency provided in its refusal. As discussed above, the Authority repeatedly has held that the RNIAP terminated any preexisting local bargaining agreements concerning assignment and, thus, the Agency did not violate the Statute by refusing to bargain at the local level over assignment matters. *See, e.g., Chapter 143*, 60 FLRA at 927-28; *DHS*, 60 FLRA at 500; *Chapter 137*, 60 FLRA at 488. These decisions do not require the Agency to refer to the RNIAP, or inform the Union of the need to request bargaining at the exclusive level of recognition, in order to lawfully refuse to negotiate with the Union at the local level. For example, although the agency in *NTEU, Chapter 137* explained its refusal to bargain by stating that management actions taken under the RNIAP could not be bargained locally, the Authority did not hold that the lawfulness of the agency's refusal to bargain at the local level depended upon the agency providing that explanation to the union. 61 FLRA at 414, 416-17.

In sum, because the Union did not establish that it attempted to bargain at the national level, the Arbitrator's finding that that the Agency improperly refused to bargain over the impact and implementation of its decision to reduce short draw leave slots is contrary to law.[6] *See Chapter 143*, 60 FLRA at 927-28; *DHS*, 60 FLRA at 500; *Chapter 137*, 60 FLRA at 488. Accordingly, we set aside the award.[7]

V. Decision

The award is set aside.

Member DuBester, Dissenting:

I do not agree with my colleagues that the Arbitrator's award should be set aside. Rather, I would find that the Agency was obligated to bargain over the impact and implementation (I&I) of its decision to reduce short draw leave slots, and deny the Agency's exceptions.

Among other things, as the decision acknowledges, the Union clearly and specifically advised the Agency of contact information at the national level for notices regarding changes in conditions of employment. Majority Op. at 4-5. The Union's communication, which pre-dated the events in this case, refers to this information as "official points of contact." Opp'n, Attach., Ex. 1B. In my view, therefore, the decision is not accurate when it concludes "the Union has not established that it attempted to bargain at anything other than the local level." Majority Op. at 5.

In addition, the Agency does not allege, and the award does not find, that the Agency followed those notification procedures for giving the Union effective notice at the national level concerning local changes in conditions of employment. Rather, the Agency's main argument before the Arbitrator was simply that it had no obligation at all, local or national, to bargain I&I. As indicated, the award, equally simply, finds that the Agency refused to bargain. The record supports that finding.

Finally, this case is very similar to *United States Department of Homeland Security, Customs & Border Protection*, 64 FLRA 989 (2010) (Member Beck dissenting) (*DHS, CBP), pet. for review filed sub nom. United States Department of Homeland Security, Customs & Border Protection v. FLRA*, No. 10-1282 (D.C. Cir. Sept. 8, 2010). That case was pending before the Authority when exceptions in the instant case were filed. Here, the Arbitrator cites, and the Agency discusses, *DHS, CBP* as possible precedent on the issue of the Agency's obligation to bargain at the national level over local changes in conditions of employment. In *DHS, CBP*, the Authority denied the Agency's exceptions to an award finding that the Agency committed unfair labor practices "by failing to provide notice and an opportunity to negotiate local assignment-policy changes at the national level." *DHS, CBP*, 64 FLRA at 990. In my view, the instant case is comparable and the Authority should similarly uphold the Arbitrator's award.

6. With regard to the dissent's reliance on "notification procedures[,]" Dissent at 7, the Union does not argue that the Agency failed to provide adequate notice; thus, we do not address that issue. Further, as there is no evidence that the Union argued to the Arbitrator – and the Arbitrator did not find – that the notice provided by the Agency was deficient, this case is distinguishable from *United States Department of Homeland Security, Customs & Border Protection*, 64 FLRA 989 (2010) (Member Beck dissenting), *pet. for review filed sub nom. United States Department of Homeland Security, Customs & Border Protection v. FLRA*, No. 10-1282 (D.C. Cir. Sept. 8, 2010), and the dissent's reliance on that decision is misplaced.

7. Because we find the award deficient as contrary to law, we do not address the Agency's other exceptions.