65 FLRA No. 182

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-4404

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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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator M. David Vaughn 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 untimely opposition to the Agency's exceptions.

The Arbitrator sustained the Union's grievance alleging that the Agency's unilateral decision to reclassify a "rotational overseas duty location" and three "hardship stations" violated the Statute and the parties' agreement. Award at 3-4. For the reasons that follow, we grant the Agency's exceptions in part, deny the Agency's exceptions in part, and set aside a portion of the award.

II. Background and Arbitrator's Award

The Agency is organized into twenty geographic sectors, each of which consists of one or more stations. *Id.* at 3. The Agency classifies its sectors and stations pursuant to criteria set forth in its administrative manuals. *See id.* at 3, 4. The Agency has one sector in Puerto Rico, the Ramey sector; it classified the Ramey sector as a "'non-rotational overseas duty location.'" *Id.* at 3 (citation omitted). This classification included several benefits intended to encourage bargaining unit employees to accept assignments in that sector, including the ability to rotate out of the sector at government expense, home leave allowances, and access to nearby military exchanges and schools. *Id.* (citation omitted). The Ramey sector is currently the only sector located overseas. Tr. at 100. The Agency also classified three stations, in Presidio and Sanderson, Texas, and Ajo, Arizona, as "[h]ardship [s]tations." Award at 4. Employees who accept and stay in positions at hardship stations also receive certain benefits, including the ability to transfer out non-competitively at the end of a tour of duty. *Id.*

On October 21, 2004, the Agency notified the Union of its intent to reclassify the Presidio and Sanderson stations as non-hardship duty stations and the Ramey sector as a non-rotational overseas duty location. *Id.* at 5 (citation omitted). The Ajo station was not mentioned. In response, on November 18, 2004, the Union demanded bargaining, submitted fourteen bargaining proposals (2004 proposals), and made information requests concerning the Agency's notification.[1] *Id.* at 5-7. No other relevant action occurred until June 30, 2006, when the Agency notified the Union that the reclassification of the Ramey sector would go into effect on October 1, 2006; the Agency made no mention of the hardship stations.[2] *Id.* at 8; Union Ex. 9. In response, on July 31, 2006, the Union again demanded bargaining, submitted seventeen different proposals (2006 proposals) concerning solely overseas stations, and made information requests.[3] Award at 8-12. The Union also reminded the Agency of its 2004 proposals concerning the Agency's decision to reclassify the Ramey sector. Exceptions, Union Ex. 10 at 1. On August 28, 2006, the Agency responded to the Union, advising it that each of the 2006 proposals were non-negotiable and that its 2004 request to bargain was "moot" because of the passage of time. Award at 12. In addition, the Agency denied the Union's information requests. *Id.* In response, the Union sent a letter explaining in

1. The 2004 proposals are set forth in the appendix to this decision.

2. The Arbitrator stated that the Agency's June 30, 2006 communication informed the Union about the reclassification of the Presidio and Sanderson stations. *See* Award at 8. However, the Agency's communication contains no such information. *See* Exceptions, Union Ex. 9 at 1-2.

3. The 2006 proposals are set forth in the appendix to this decision.

greater detail the "particularized need" for the requested information and challenging the Agency's determination of non-negotiability. *Id*. Sometime after this letter was sent, the Agency changed the status of the Ramey sector to non-rotating and the statuses of the Presidio, Sanderson, and Ajo stations to non-hardship. *Id*. The Agency posted vacancy announcements for permanent positions in the Ramey sector and for positions in the former hardship stations reflecting the loss of hardship status. *Id*. at 13.

The Union presented a grievance, which the Agency denied. The Union then invoked arbitration. *Id*. The parties stipulated to the following issue:

> 1. Did the Agency fulfill its bargaining obligations before converting the Ramey sector to a non-rotational duty status and the Presidio, Sanderson, and Ajo stations to non- hardship duty stations?

Id. In addition, the Union proposed, and the Arbitrator accepted, the following issues:

> 2. Does the Agency have the legal authority to terminate the overseas status of the Ramey post?
>
> 3. If not, what is the remedy?

Id. at 13-14.

The Arbitrator determined that the Agency's proposed changes directly affected terms and conditions of employment, thereby triggering an obligation to notify the Union of the proposed changes and the Union's right to request information and bargaining. *Id*. at 25. The Arbitrator then assumed, for the sake of argument, that the Agency's reclassification of sectors and duty stations so as to affect the duration of assignments was the exercise of management's right to assign work. *Id*. at 26. Acknowledging that there is no right to bargain over the assignment of work, the Arbitrator nonetheless found that there was an obligation to bargain over the impact and implementation of the reclassifications. *Id*. As to the negotiability of the Union's 2004 proposals and its 2006 proposals, the Arbitrator found them all to be negotiable because they were "fashioned . . . to address and ameliorate the consequences of the Agency's actions." *Id*. at 27. Thus, he concluded that both sets of proposals were within the Agency's duty to bargain. The Arbitrator also found that the Union demonstrated a "particularized need" for the information it requested, and, as such, the Agency improperly denied the Union's information request.[4] *Id*. at 26-27.

The Arbitrator found that the Agency's refusal to provide the Union with the requested information, along with the Agency's failure to give notice in 2006 of its proposed changes to the hardship status of the three duty stations, its determination that all Union proposals were non-negotiable, and its refusal to bargain, established that the Agency violated its obligation under the Statute and the parties' agreement to bargain in good faith. *Id*. at 29. As a remedy, the Arbitrator ordered that the Agency provide to the Union the requested information, that the parties bargain over the Union's proposals, that the parties return to the status quo ante pending the results of bargaining, and that the Agency post a notice to all employees rescinding the reclassifications and agreeing to comply with the parties' agreement and the Statute prior to making any other changes to conditions of employment. *Id.* at 29-31.

III. Agency's Exceptions

The Agency contends that it complied with the Statute and the parties' agreement, and that the Arbitrator's conclusion to the contrary is contrary to law. Exceptions at 7-8. The Agency first argues that all seventeen 2006 proposals are "outside the duty to bargain" because they apply "to *all* employees in overseas locations," rather than just the Ramey sector employees. Exceptions at 15 (emphasis in original). The Agency also argues that the first twelve 2006 proposals are non-negotiable because they interfere with management's right to assign work under § 7106(a)(2)(B) of the Statute. *See id*. at 12-14.

The Agency also avers that the Arbitrator's conclusion that the Agency failed to provide the Union with notice and an opportunity to bargain over the reclassifications is contrary to law. The Agency contends that it provided the Union with notice of and opportunity to bargain over the proposed Presidio, Sanderson, and Ramey reclassifications in 2004 and 2006. *Id*. at 8-9. According to the Agency, the Union responded to both notices by submitting proposals, and the Agency responded by informing the Union that all of the proposals were non-negotiable. *See id.* According to the Agency, because the proposals submitted by the Union were

4. The Agency does not dispute this finding. Accordingly, we do not address it further.

non-negotiable, the Agency satisfied its bargaining obligation. *Id.* at 9.

IV. Preliminary Issue

Under the Authority's Regulations, a party may file an opposition to exceptions within thirty days after the date of service of the exceptions. 5 C.F.R. § 2425.1(c).[5] The Agency served its exceptions by mail on July 21, 2008, and, accordingly, the Union's opposition was required to be filed by August 25, 2008. Order to Show Cause at 1. The Union's opposition was postmarked August 26, 2008. *Id.* at 2. The Authority directed the Union to show cause why its opposition should be considered because it appeared to be untimely filed. *Id.* at 1.

The Authority finds, and the Union concedes, that the Union's opposition was filed one day after it was due. The Union explains that the cause of the untimely filing was "a simple mistake in computing when the opposition brief was actually due" and not extraordinary circumstances. Union Response to Show Cause Order at 2. The Authority previously has found that, where an opposition was filed one day late by commercial delivery, extraordinary circumstances did not exist warranting waiver of the expired deadline. *See NTEU*, 60 FLRA 226, 226 n.1 (2004); *see also U.S. Dep't of the Treasury, Customs Serv., San Diego Dist., San Diego, Cal.*, 58 FLRA 240, 241 n.1 (2002) (where a party did not dispute that its exceptions filed by commercial delivery were one day late under § 2429.21(b), the Authority refused to waive the expired time limit); *AFGE, Local 3369*, 55 FLRA 1074, 1074 n.1 (1999) (Authority refused to consider an opposition filed one day late); *AFSCME, Local 3870*, 50 FLRA 445, 448 (1995) ("a simple mistake in filing does not constitute a basis for a waiver of a[n expired] time limit"). Accordingly, we find that extraordinary circumstances do not exist here and that, as a result, we will not consider the Union's opposition.

V. 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 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.*

Furthermore, when resolving a grievance that alleges an unfair labor practice (ULP) under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 431 (2010) (*IRS*). Consequently, in resolving the grievance, the arbitrator must apply the same standards and burdens that are applied by ALJs under § 7118 of the Statute. *Id.* In a grievance that alleges a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *Id.* As in other arbitration cases, in determining whether the award is contrary to the Statute, the Authority defers to the arbitrator's findings of fact. *Id.*

A. The Agency did not have an obligation to bargain over the 2006 proposals.

The Agency avers that all of the 2006 proposals are "outside the duty to bargain" because they apply to all overseas employees rather than only Ramey sector employees. Exceptions at 15. It is well established that, prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain if the change will have more than a de minimis effect on conditions of employment. *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr. Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173 (2009) (Member Beck concurring in part on other grounds); *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89 (2009). Where such a change to conditions of employment falls within an agency's exercise of a management right under § 7106 of the Statute, the agency is nevertheless obligated to notify the exclusive representative and negotiate over the impact and implementation of the change. *See, e.g., U.S. Dep't of the Treasury, IRS*, 62 FLRA 411, 414

5. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including the Regulations governing commercial filing, were modified effective November 9, 2009, *see* 74 Fed. Reg. 51,741 (2009), and again October 1, 2010, *see* 75 Fed. Reg. 42,283 (2010). As the exceptions in this case were filed prior to November 9, 2009, we apply the prior version of the Regulations here.

(2008). However, the Authority has held that, during such bargaining, an agency is obligated to bargain only over proposals that are reasonably related to the proposed change in conditions of employment. *See U.S. Dep't of Health & Human Servs., SSA, Balt., Md.*, 39 FLRA 258, 262 (1991) (*SSA*) (citing *Dep't of Health & Human Servs., SSA, Balt., Md.*, 31 FLRA 651, 656 (1988)); *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 770, 783 (1990). An agency, therefore, is not required to bargain over proposals that go beyond the scope of a proposed change. *See, e.g., FLRA v. U.S. Dep't of Justice*, 994 F.2d 868, 871-72 (D.C. Cir. 1993); *Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 22 FLRA 502, 506 (1986) (*Wright-Patterson*).

The Union's 2006 proposals are not reasonably related to the change that they supposedly address. The Agency decided to reclassify the Ramey sector as a non-rotational overseas duty station. Award at 8, 12; Exceptions, Union Ex. 9 at 1. When it announced this decision, the Agency did not reference any other overseas stations/employees or mention any change to the Agency's guidelines concerning the classification of such stations. *See* Exceptions, Union Ex. 9 at 1-2. Consistent with its announcement, the Agency reclassified only the Ramey sector.[6] Despite this limited change, in 2006, the Union submitted proposals that address *all* overseas stations/employees. *See, e.g.*, Award at 9 (proposal one states that "[t]he initial tour of duty for all [Agency] employees assigned to *any overseas location* will be two years") (emphasis added); *id.* at 11 (proposal 14 states that "*[a]ll employees serving in overseas assignments* will accrue home leave in the amounts specified in government-wide regulations") (emphasis added); *id.* (proposal 15 states "*[a]ll employees serving in overseas assignments* will receive a cost-of-living allowance in the amount specified in applicable government regulations) (emphasis added).

The proposals contain no language that state they are limited to the Ramey sector. Indeed, when it submitted the 2006 proposals, the Union expressly stated that the proposals were not limited to the Ramey sector. *See* Exceptions, Union Ex. 10 at 3 n.4 (in setting forth 2006 proposals, Union stated it needed information from Agency "to determine the extent of the impact of the [Agency's] proposal on employees who are and will be assigned to the Ramey . . . Sector *and/or any other overseas location*, and to assist it in perfecting its bargaining proposals" (emphasis added)). Furthermore, although the Union president testified that the Ramey sector was the only overseas section, he did not testify that the 2006 proposals were limited to the Ramey sector. *See* Tr. at 100-01. Thus, if the proposals were adopted, they would apply to *any* overseas sector the Agency may create in the future.

The 2006 proposals concern *all* overseas stations and employees, including those that the Agency may create in the future. As a result, the 2006 proposals are not reasonably related to the relevant change in conditions of employment. *See Wright-Patterson*, 22 FLRA at 506 (where agency changed facial hair policy for employees that used respirators, Authority found that proposals concerning the general use of respirators were not reasonably related to that change in condition of employment).

The Arbitrator rejected this conclusion because he believed that the proposals went "directly to the changes proposed by the Agency." Award at 28. The Arbitrator's conclusion, however, is misplaced. As described above, the 2006 proposals were not limited to the relevant change in conditions of employment; as such, the proposals do not "go directly" to that change. *Id.*

Because the 2006 proposals are not reasonably related to the change in conditions of employment that they supposedly address, the Agency had no obligation to bargain over them. *See Wright-Patterson*, 22 FLRA at 506. Accordingly, we find that the Arbitrator's conclusion that the Agency was required to bargain over the 2006 proposals is contrary to law and should be set aside.[7] By extension, we also set aside the Arbitrator's determination that the Agency violated the Statute and the parties' agreement by failing to bargain over the 2006 proposals.

6. We note that, in 2006, the Agency also changed the hardship classifications of the Sanderson, Presido, and Ajo stations. *See* Award at 12. However, the 2006 proposals clearly were not related to that change because they addressed only the classification of overseas locations. *See id.* at 9-12 (setting forth 2006 proposals).

7. Based on this finding, it is unnecessary to address the Agency's assertion that proposals one through twelve of the 2006 proposals interfere with management's right to assign work under § 7106(a)(2)(B) of the Statute.

B. The Agency did not provide the Union with adequate notice and an opportunity to bargain.

The Agency contends that it provided the Union with adequate notice and an opportunity to bargain over the reclassifications because it informed the Union that its 2004 proposals were non-negotiable.[8] As discussed above, when an agency changes a condition of employment, it must provide a union with notice and an opportunity to bargain over the aspects of the change that are negotiable. This obligation to bargain is predicated on the union's submission of negotiable proposals. An agency may refuse to bargain where it contends that the proposals submitted by the union are nonnegotiable. *See PBGC*, 59 FLRA 48, 50 (2003) (then-Member Pope dissenting in part) (citing *U.S. Dep't of HUD*, 58 FLRA 33 (2002) (*HUD*)). However, the agency acts at its peril if it then implements the proposed change in conditions of employment. *See, e.g., SSA*, 39 FLRA at 262-63. If *all* pending union proposals are nonnegotiable, the agency will not be found to have violated the Statute by implementing the change without bargaining over them. However, if *any* pending union proposals are negotiable, the agency will be found to have violated the Statute by implementing the change without satisfying its obligation to bargain over the negotiable proposals and either reaching agreement or declaring impasse. *See, e.g., Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999) (Chairman Segal concurring on other grounds) (citing *SSA*, 39 FLRA at 262-63).

The Arbitrator concluded that all of the 2004 proposals were negotiable. Award at 28, 30. The Agency does not challenge that conclusion. Consequently, as explained above, the Agency did not satisfy its bargaining obligation because it refused to bargain over negotiable proposals. *See HUD*, 58 FLRA at 35 (after determining that proposal at dispute was negotiable, Authority concluded that agency violated Statute by refusing to bargain over proposal on the basis that it considered proposal non-negotiable).

Accordingly, we find that the Arbitrator's conclusion that the Agency violated the Statute and the parties' agreement when it declined to bargain over the 2004 proposals is not contrary to law.

VI. Decision

The Agency's exceptions are granted in part and denied in part. The portion of the award concluding that the Agency violated the Statute and the parties' agreement by refusing to bargain over the 2006 proposals is set aside.

8. The Agency also argues that it provided the Union with adequate notice and an opportunity to bargain because it informed the Union that the 2006 proposals were non-negotiable. Because we find that the 2006 proposals are outside the Agency's duty to bargain, it is unnecessary to address this argument. We also note that the Agency has not asserted that the 2006 proposals replaced the 2004 proposals.

APPENDIX

The Union's 2004 proposals are as follows:

1. The Presidio and Sanderson, Texas Border Patrol stations shall remain designated as hardship duty locations.
2. Six months prior to fulfilling two years of service in the Presidio or Sanderson, Texas Border Patrol stations (or at any time of their choosing thereafter), employees shall be allowed to submit a list of at least five Border Patrol stations to which they desire to transfer, ranked in order of preference.
3. The Ramey, Puerto Rico Border Patrol Sector shall remain designated as rotational overseas location.
4. Six months prior to fulfilling three years of service in the Ramey, Puerto Rico Border Patrol Sector (or six months prior to fulfilling an overseas tour renewal agreement, or, if none has been executed, at any subsequent time of their choosing), employees shall be allowed to submit a list of at least five Border Patrol stations to which they desire to transfer.
5. If a vacancy exists in one of the stations on an employee's list of preferred stations, the employee's reassignment to the highest-ranked station on their list of preferences shall be approved unless the management official responsible for selections to that location articulates a *bona fide* reason for not doing so. Such explanation shall be set forth in writing and provided to the employee.
6. If no vacancies exist in any of the stations on an employee's list of preferred stations, management may, in its sole discretion, create one and reassign the employee to that station.
7. If the foregoing procedure does not result in an employee being approved for reassignment to one of his or her preferred locations, the employee shall be advised of this fact within thirty calendar days of submitting his or her initial preferences, and shall be requested to expand their list of preferences by at least five locations.
8. The aforementioned process shall continue until the employee is reassigned.
9. Employees assigned to the Presidio or Sanderson, Texas Border Patrol stations who are selected for reassignment under these procedures shall have their relocation approved and funded within thirty calendar days following their selection, unless their initial two-year tour of duty has not expired at that point, in which case their relocation shall be approved and funded within thirty calendar days following the expiration of their initial two-year tour of duty at that location.
10. Employees assigned to the Ramey, Puerto Rico Border Patrol Sector who are selected for reassignment under these procedures shall have their relocation approved and funded within thirty calendar days following the expiration of their initial or renewal overseas tour assignment.
11. Employees who are reassigned under these procedures are entitled to full reimbursement for all of their relocation expenses.
12. Employees do not waive their right to hardship or overseas rotation by inaction; they may invoke it at any time.
13. The Bureau shall take all reasonable steps to ensure that the eligible dependents of all employees assigned to the Ramey, Puerto Rico Border Patrol Sector, regardless of the duration of their assignment or their permanent place of residence, are able to participate in the Department of Defense Overseas Dependent School System.
14. The Bureau shall take all reasonable steps to ensure that all employees assigned to the Ramey, Puerto Rico Border Patrol Sector, regardless of the duration of their assignment or their permanent place of residence, have military base privileges.

Award at 6-7.

The Union's 2006 proposals are as follows:

1. The initial tour of duty for all Border Patrol employees assigned to any overseas location will be two years.
2. As an incentive for employees to remain overseas, the Bureau will offer relocation and/or retention bonuses of no less than 10% of the employees' annual rate of basic pay for each year that they extend their tour of duty.
3. Employees who are serving in an overseas assignment may request to renew their tour of duty in two-year increments. There will be no limit to the number of tour renewal requests. Such requests may be made at any time after an employee has completed 18 months of service overseas on a given tour

of duty, but must be made before the employee has completed 22 months of service for that tour of duty, at which point it will be assumed that the employee is desirous of rotating back to the continental United States.

4. An employee whose request for tour renewal is granted will receive tour renewal travel in accordance with the provisions of the Federal Travel Regulation.
5. Six months prior to fulfilling their tour of duty overseas, employees will be allowed to submit a list of at least five Border Patrol stations to which they desire to transfer.
6. If a vacancy exists in one of the stations on an employee's list of preferred stations, the employee's reassignment to the highest-ranked station on their list of preferences will be approved unless the management official responsible for selections to that location articulates a *bona fide* reason for not doing so. Such explanation will be set forth in writing and provided to the employee.
7. If no vacancies exist in any of the stations on an employee's list of preferred stations, management may, in its sole discretion, create one and reassign the employee to that station.
8. If the foregoing procedure does not result in an employee being approved for reassignment to one of his or her preferred locations, the employee will be advised of that fact within thirty calendar days of submitting his or her initial preferences, and will be requested to expand his or her list of preferences by at least five locations.
9. The aforementioned process will continue until the employee is reassigned.
10. Employees assigned to an overseas location who are selected for reassignment under these procedures will have their relocation approved and funded within thirty calendar days following the expiration of their initial or renewal overseas tour agreement.
11. Employees who are reassigned under these procedures are entitled to full payment for all of their relocation expenses.
12. Employees do not waive their right to overseas rotation by inaction; they may invoke it at any time.
13. Employees . . . are eligible for return travel and transportation . . . [from their] overseas duty station. . . .
14. All employees serving in overseas assignments will accrue home leave . . . .
15. All employees serving in overseas assignments will receive a cost-of-living allowance . . . .
16. All employees serving in overseas assignments who have dependent children will be entitled to utilize the Department of Defense Overseas Dependent School system . . . .
17. All employees serving in overseas assignments will be entitled to utilize military base privileges. . . .

Id. at 9-12.