65 FLRA No. 24

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1547
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA
(Agency)

0-AR-4278

DECISION

September 28, 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 Donald Daughton 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 Agency unilaterally changed the access requirements for its email system. Under the new requirements, bargaining unit employees could only access the system by using a "Common Access Card" (CAC) reader when they were at an off-base location. The Union grieved, arguing that this action constituted an unfair labor practice (ULP). The Arbitrator denied the grievance, finding that the Agency's action did not have an impact on the working conditions of bargaining unit employees.

For the reasons discussed below, we deny the Union's exception that the award is based on a nonfact. In addition, as discussed below, we deny in part and grant in part the Union's exceeded authority exception. Finally, with respect to the part of the exceeded authority exception that we grant, we remand the matter to the parties for resubmission to the Arbitrator, absent settlement, for further proceedings consistent with the Authority's decision.

II. Background and Arbitrator's Award

On November 22, 2006, for security reasons, Luke Air Force Base discontinued off-base access to its email system through the use of a password. Award at 2-3. Instead, off-base access to the Agency's email system was restricted to individuals with CAC readers. *Id.* Employees, including bargaining unit members, wishing to access the Agency's email system had to purchase their own CAC readers. When the Agency implemented the change without prior notice to the Union, the Union filed a grievance. The matter was not resolved and was submitted to arbitration.

The parties stipulated six issues for the Arbitrator to decide. The first issue, on which the Arbitrator ultimately resolved the grievance, concerned whether the Agency had changed bargaining unit employees' conditions of employment when it changed procedures for accessing the Agency's email system. Specifically, the first issue was:

> 1. Did [the Agency] violate the law by committing [ULPs], 5 USC § 7116, when it made the unilateral changes to the conditions of employment for the bargaining unit employees of Luke AFB?

Id. at 1.

The next four issues, which the Arbitrator did not reach, concerned whether the Agency had fulfilled various aspects of its bargaining obligation, assuming that it had changed bargaining unit employees' conditions of employment. Those issues were:

> 2. Did the [Agency] give proper notice of the change to the Union?
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> 3. Did the [Agency] give the Union an opportunity to bargain?
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> 4. Did the [Agency] negotiate the Impact and Implementation concerning the changes to the email systems?

> 5. Did [the Agency] violate Article III, Article IV and Article VI of the LMA [Labor Management Agreement] when it made unilateral changes to the email access for employees from off-base [Temporary Duty], etc.?[1]

Id. at 1-2.

The final issue, which the Arbitrator also did not reach, concerned the Agency's compliance with a Memorandum of Understanding (MOU) dated June 27, 2006. The sixth issue was:

> 6. Did [the Agency] violate the MOU dated June 27, 2006, concerning CAC and [Smart Card Login] access for [bargaining unit employees]?

Id. at 2.

The Arbitrator found that before the Agency changed its procedure for accessing the Agency's email system, employees could access the system from off-base with a password. Award at 3. This, he determined, enabled employees to utilize a "Federal Job Website" from off-base to apply for off-base job opportunities. *Id.*

The Arbitrator noted that when off-base access to its email system resulted in a number of security breaches, the Agency changed its access policy and restricted off-base access to individuals with CAC readers. *Id.* The new policy required an employee who wanted to access the Agency's email system from off-base to purchase his/her own CAC reader. *Id.* at 4. The Arbitrator determined that the Agency changed its access policy without prior notice to the Union. *Id.* at 3-4. He further found that the Union's "central complaint" about the change concerned the change's impact on the ability of employees to utilize a Federal Job Website via the Agency's email system to apply for off-base jobs. *Id.* at 4.

Focusing on the first stipulated issue, the Arbitrator identified the "core question" in the case as whether off-base email access through the use of a password was within the statutory definition of a "condition of employment." *Id*. The Arbitrator determined that it was not. He found that the elimination of password access to the Agency's email system "does not affect the ability of an employee to perform his or her duties and does not affect their day to day working conditions." *Id.* "Rather," the Arbitrator found, the elimination of off-base password access "simply limits a bargaining unit employee's ability to seek off-base employment through a Federal Job Website." *Id.* The Arbitrator concluded that "[n]o credible evidence was presented to show how this would affect a bargaining unit employee's working conditions . . . ." *Id.* at 4-5.

Because the Arbitrator found that "there is no factual basis . . . for finding conduct on the part of the [Agency] which impacts on the working conditions of the bargaining unit employees," he concluded that it was "unnecessary to resolve the remaining issues urged by the Union," apparently viewing them as moot. *Id.* at 5. The Arbitrator therefore denied the grievance.

III. Positions of the Parties

A. Union's Exceptions

The Union claims that the Arbitrator relied on a nonfact when he found that, as pertinent to the arbitration, bargaining unit employees needed off-base access to the email system to apply for "off-base job opportunities." Exceptions at 2-3. The Union asserts that the issues presented at arbitration did not concern the employees' ability to apply for off-base job opportunities, but rather focused on the employees' ability to apply for vacant Agency positions. *Id*.

The Union also argues that the Arbitrator exceeded his authority by not addressing all of the stipulated issues that were before him. *Id.* at 2. The Union does not make specific claims with regard to stipulated issues two through five. However, it does specifically address the sixth issue, asserting that the Arbitrator improperly failed to determine whether the Agency violated the 2006 MOU, in which the Agency agreed to "keep the Agency email systems available to employees . . . ." *Id.* at 4.

In addition, the Union claims that the Arbitrator exceeded his authority when he addressed an issue -- whether applying for vacant positions using the Agency's email system is a condition of employment -- that was not stipulated by the parties as part of the grievance. *Id*. at 3-4. According to the Union, under Article XXVII, § B of the parties' collective bargaining agreement, only issues presented during

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1. Articles III, IV, and VI of the LMA concern bargaining obligations related to bargaining unit employees conditions of employment.

the grievance procedure and stipulated by the parties can be submitted to arbitration.[2] *Id.*

Finally, the Union argues that the award fails to draw its essence from the parties' agreement by failing to address all the stipulated issues and by not being limited to the issues stipulated by the parties, as required by Article XXVII of the parties' collective bargaining agreement.[3] *Id.* at 2-4.[4]

B. Agency's Opposition

The Agency does not address the Union's nonfact exception.

The Agency argues that the Arbitrator did not exceed his authority. It contends that the Arbitrator correctly decided the first issue when he found that the Agency's unilateral action modifying employee email access was not a ULP because it did not affect any conditions of employment. Opp'n at 1-4. The Agency further claims that the Arbitrator's conclusion concerning the first stipulated issue rendered the remaining issues moot. *Id.* at 4. Because the Agency had not changed unit employees' conditions of employment, there remained no issues concerning whether the Agency had fulfilled its obligation to bargain over changes to conditions of employment. *Id.* at 3-4.

The Agency also asserts that the Arbitrator did not exceed his authority when he addressed an issue that was not stipulated by the parties as part of the grievance. The Agency contends that, although it was not among the parties' stipulations, whether off-base email access is a condition of employment was directly related to the resolution of the first stipulated issue. The Agency notes that arbitrators do not exceed their authority by addressing issues that are necessary to decide a stipulated issue. *Id.* at 3-4.

Finally, the Agency claims that the Arbitrator's decision draws its essence from the parties' agreement. The Agency recognizes that the parties' agreement requires that the parties stipulate all issues to be arbitrated. However, the Agency argues that the condition of employment issue addressed by the Arbitrator, although not stipulated, had to be addressed in order to resolve the first stipulated issue. *Id.* at 4-5. The Agency asserts that the Union's essence exception is merely a disagreement with the Arbitrator's interpretation and application of the parties' agreement. *Id.* at 5.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union disagrees with the Arbitrator's factual finding that, as pertinent to the arbitration, off-base email access was needed to apply for off-base job opportunities. It argues that off-base email access was needed to apply for Agency positions. Exceptions at 2-3.

In order to establish that an award is based on a nonfact, a party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. Dep't of the Air Force, Lowry AFB, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry AFB*).

The Union has not established that the Arbitrator's determination that bargaining unit employees needed off-base email access to apply for "off-base job opportunities" was clearly erroneous. Exceptions at 2-3. In support of its nonfact claim, the Union relies on two MOUs between the parties that reference employees' ability to access the Agency's computer system to self-nominate for positions (MOU dated 2001) and apply for jobs (MOU dated 2006).[5] However, the MOUs are ambiguous, as

2. Article XXVII, § B states in pertinent part:

> The parties agree that the issue(s) to be arbitrated will be consistent with those issue(s) presented during the grievance procedure. . . . The arbitrator shall confine his/her award to the issue(s) stipulated at the hearing and will not have the authority to make a decision on any issue(s) not so stipulated . . . .

Exceptions, Attach. 3 at 1.

3. The Union's claim that the award fails to draw its essence from the parties' LMA is substantively the same as its exceeded authority claims that the Arbitrator improperly failed to address all stipulated issues and addressed an issue that was not stipulated by the parties pursuant to the parties' LMA. *See* Exceptions at 2-4. Therefore, the Union's essence exception is not analyzed separately.

4. The Union is not challenging, on contrary to law grounds, the Arbitrator's conclusion that the disputed email access is not a condition of employment.

5. The 2001 MOU concerned the implementation of Air Force Manual 36-203-- Staffing Civilian Personnel Positions. The MOU provided that, upon request, email accounts would be provided to bargaining unit employees, and access to the computer system would be made

neither indicates whether employees need email access solely to apply for positions within the Agency. Moreover, neither MOU addresses which email access issues were raised before the Arbitrator. Ambiguous evidence is not sufficient to establish that an Arbitrator's factual determination is clearly erroneous. *See Lowry AFB,* 48 FLRA at 594. Consequently, we deny the Union's nonfact exception.

B. The Arbitrator exceeded his authority by failing to resolve a stipulated issue submitted to arbitration.

1. The Arbitrator did not exceed his authority by not addressing all of the stipulated issues.

The Union argues that the Arbitrator exceeded his authority by not resolving all of the stipulated issues. Exceptions at 2.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Arbitrators, however, do not exceed their authority when they do not resolve issues that become moot as a consequence of the resolution of other issues. *Cf. AFGE, Local 987*, 58 FLRA 619, 621 (2003) (then-Member Pope dissenting) (finding that a grievance was barred by the Statute, the arbitrator did not exceed his authority by not resolving other claims raised before the arbitrator).

a. Stipulated issues numbers two through five.

The Arbitrator did not exceed his authority by not resolving stipulated issues two through five. The Arbitrator's determination not to reach those issues was based on his resolution of the first stipulated issue. That issue concerned whether the Agency committed a ULP when it unilaterally changed a condition of employment of bargaining unit employees. Award at 1. The condition of employment alleged to have been changed was the bargaining unit employees' ability to access their email accounts when off-base. *Id.* at 2. In this regard, the Arbitrator concluded that there was no duty to bargain because the Agency's decision to change its email policy did not have an impact on the working conditions of bargaining unit employees, and consequently that the Agency did not commit a ULP when it unilaterally changed the access to the email system.

When the Arbitrator found that the Agency's action did not have an impact on the working conditions of bargaining unit employees, it rendered stipulated issues two through five moot. These issues concerned whether the Agency had fulfilled various aspects of its bargaining obligation relating to Agency changes in conditions of employment. If the Agency had, in fact, changed a condition of employment, then it would have been pertinent to consider the issues raised by stipulated issues two through five. *See NTEU*, 64 FLRA 462, 464 (2010) (prior to changing conditions of employment, agencies must provide the exclusive representative notice of the change and an opportunity to bargain). However, here, the Arbitrator concluded that the change in the Agency's email policy did not affect employees' working conditions because off-base email access was not a condition of employment.

As the Arbitrator found that the Agency's action did not have an impact on the working conditions of bargaining unit employees, it became a moot point whether the Agency was required to give the Union notice of the change in policy (second issue); or to resolve whether the Agency was required to negotiate the impact and implementation of the changes to the email system (fourth issue). In addition, because the Arbitrator found that there was no duty to bargain, the issue of whether the Agency failed to give the Union an opportunity to bargain (third issue) became moot as well. Finally, as a result of the Arbitrator's conclusion with regard to the first issue, it also became moot for the Arbitrator to resolve whether there was a violation of Articles III, IV, and VI of the parties' LMA (fifth issue) because these articles also concern bargaining obligations over changes relating to conditions of employment.[6] Accordingly, as issues two through five became moot when the Arbitrator resolved the first issue, there was no need for the Arbitrator to address them. Consequently, the Arbitrator did not exceed his authority by not resolving issues two through five.

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available in the employee's unit or squadron and/or Civilian Personnel Office. Exceptions, Attach. 2 at 1. The 2006 MOU provides, in pertinent part, that to access secure websites that require authentication from off-base locations or personal computers, a password may have to be established using the CAC at the work location. *Id*., Attach. 1 at 1. The MOU also provides that systems, servers, and websites used by the employees to apply for jobs will remain accessible to employees through the "current" user identification password procedures on private computers. *Id*.

6. Articles III, IV, and VI of the parties' LMA are set forth in the Appendix.

b. Stipulated issue number six.

However, in contrast to issues two through five, the sixth stipulated issue did not become moot with the resolution of the first issue. The Arbitrator, therefore, exceeded his authority by not addressing issue number six. Unlike issues two through five, the sixth stipulated issue has nothing to do with whether the change in the Agency's email access policy had an impact on employees' working conditions. The sixth issue only required the Arbitrator to determine whether the Agency violated the 2006 MOU when it changed its policy regarding off-base email access. Award at 2. As indicated previously, supra note 4, the 2006 MOU provided, in part, that systems, servers, and websites used by employees to apply for jobs would remain accessible to employees through the then-current user id/password procedures on private computers. Exceptions, Attach. 1.

Accordingly, the Arbitrator exceeded his authority by failing to resolve a stipulated issue submitted to arbitration. *See U.S. Dep't of Def., Def. Contract Audit Agency*, *Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (arbitrator exceeded his authority when he failed to resolve an issue submitted to arbitration).

2. The Arbitrator did not exceed his authority when he resolved an issue that was not submitted to arbitration.

The Union also claims that the Arbitrator exceeded his authority because he resolved an issue -- whether off-base access to the Agency's email system is a condition of employment -- that was not submitted to arbitration. Exceptions at 2-3.

Arbitrators exceed their authority when they resolve an issue not submitted to arbitration. *AFGE, Local 1617*, 51 FLRA at 1647. However, arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue or by addressing an issue that necessarily arises from issues specifically included in a stipulation. *E.g., NTEU*, 64 FLRA 982, 986 (2010).

The Arbitrator did not exceed his authority by resolving whether off-base access to the Agency's email system was a condition of employment. As noted in Section B.1., above, in order to resolve whether the Agency committed a ULP when it unilaterally changed its email policy, it was necessary for the Arbitrator to address whether the change in email policy affected employees' working conditions. This in turn made it necessary for the Arbitrator to address whether off-base email access was a condition of employment.

As arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue, the Arbitrator here did not exceed his authority by addressing this issue.

V. Decision

We deny the Union's nonfact exception. We grant in part and deny in part the Union's exceeded authority and essence exceptions. We remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further proceedings consistent with this decision.

APPENDIX

Article III, Section B

> *The Union has the right to negotiate with the Employer over changes to policies, programs, and procedures related to conditions of employment* which are within the authority of the Employer. The Union also has the right to submit mid-term proposals on subjects not covered by this agreement as well as all new laws, rules, and regulations.

Article IV, Section F

> The parties agree to work together in *promoting positive employee attitudes and esprit de corps with the objective of increased production*, reduced rates of errors, and more effective accomplishment of the mission of the base. To this end[,] Union representatives and Management officials will: Paragraph 3. *Promote friendly and harmonious working relationships* between supervisors and their subordinates and *between civilian and military personnel*[.] Paragraph 7. Strive to eliminate inequitable treatment of employees and any other practices which restrict and hamper efficiency and affect morale.

Article VI, Section A

> When a change will affect conditions of employment[,] *Management will notify the Union president*. Except in emergencies, *pending changes will not be implemented until required negotiations are completed*. The parties recognize that negotiations may be required even though the change, as a result of the emergency, has been implemented.

Exceptions, Attach. 5, Union's Post-Hearing Brief at 4.