

66 FLRA No. 149

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
ZABLOCKI VA MEDICAL CENTER
MILWAUKEE, WISCONSIN
(Agency)

and

WISCONSIN FEDERATION
OF NURSES AND HEALTH PROFESSIONALS
VETERANS AFFAIRS STAFF NURSES COUNCIL
LOCAL 5032, AFT
(Union)

0-AR-4788

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DECISION
July 19, 2012
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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 Carl F. Jenks 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 concluded that the Agency violated the parties’ agreement when it provided nurses with off-site parking that did not comply with the safe-employee-parking requirements set forth in the parties’ agreement and established by past practice.

For the reasons that follow, we modify the award by setting aside the part of the Arbitrator’s remedy that directs the Agency to provide off-site shuttle service, and roving police patrols and escort service by armed Agency police with full police enforcement authority, and deny the Agency’s remaining exceptions.

II. Background and Arbitrator’s Award

A. Background

The Agency, a medical center, is a tenant on the campus of the United States Department of Veterans Affairs (VA) in Milwaukee, Wisconsin. The Union

represents nurses who work at the medical center. The Agency announced to employees and their unions the availability of an overflow parking lot leased “at an off-site industrial complex.” Award at 4. In the announcement, the Agency stated that it would not provide employees with shuttle service to the off-site lot, or escort service to their vehicles by armed VA police.¹ *Id.* In contrast, the Agency provides these services when nurses park on-campus. *Id.* at 4 nn.3 & 4.

The Union filed a grievance alleging that the off-site parking lot did not comply with the “safe employee parking” requirements under Article XX, §§ 2(a) and 2(c) of the parties’ agreement and established past practice.² Award at 4; *see* Exceptions, Joint Ex. 2 (grievance).

B. Arbitrator’s Award

Recognizing that parking at the off-site lot might no longer be an issue, the Arbitrator described his award as “in the nature of a declaratory ruling” and “to establish a precedent [for] future off-site parking.” Award at 6-7. The Arbitrator based his description on a witness’ testimony at the hearing that the lease for the off-site lot “could be terminated as soon as July 31, 2011.” *Id.* at 6. The Arbitrator further noted the VA Police Chief’s testimony that “[n]ot only is there no demand, . . . nobody’s actually used the lot at this time.” *Id.* Nonetheless, the Arbitrator proceeded to issue an award to “establish[] a standard for the future.” *Id.* at 7.

The Arbitrator concluded that the Agency violated the parties’ agreement and past practice when it provided nurses with off-site parking that did not comply with the safe-employee parking available on the VA campus. Award at 11. As a remedy, the Arbitrator ordered the Agency to provide nurses with safe-employee parking, whether parking is on-campus or off-site. *Id.* at 14. The Arbitrator found that safe-employee parking

¹ The record reflects that another tenant agency on the VA campus, the Veterans Benefits Administration (VBA), was the actual lessee of the off-site parking lot. *See* Exceptions at 3 (citing Tr. at 52, 58-62). The VBA advised the Agency that it could offer the nurses parking at the off-site lot. *Id.* at 4. (citing Tr. at 52-55).

² Article XX § 2, provides, in relevant part:
a. Adequate and safe employee parking will be provided.

.....

c. VA Police will provide escort when available and if requested, during hours of darkness and/or inclement weather. After driving an employee to his or her car, security will remain in the area until the car is running.

Award at 5.

included providing nurses with shuttle service, and roving police patrols and escort service by armed VA police “with full police enforcement authority.”³ *Id.*; *see id.* at 13, 14. Alternatively, the Arbitrator ordered that, if Agency compliance with safe-employee-parking requirements in off-site-parking situations is “not possible,” then the Agency will “either negotiate new contractual language or seek waivers that address federal restrictions presently in place.” *Id.*

III. Positions of the Parties

A. Agency’s Exceptions

The Agency contends that the award is contrary to law and based on nonfacts. The Agency cites two grounds for its contrary-to-law exceptions.

First, the Agency contends that the Arbitrator’s remedy mandating that the Agency provide nurses with off-site-shuttle service, or negotiate over such shuttle service, is contrary to 31 U.S.C. § 1344(a)(1).⁴ Exceptions at 8-11. The Agency claims that the award is contrary to 31 U.S.C. § 1344(a)(1) because it requires the Agency to fund shuttle service for part of nurses’ home-to-work commute. *Id.* at 9-10.

Second, the Agency contends that the Arbitrator’s remedy mandating that the Agency provide, or negotiate or seek waivers over, roving police patrols and escort service off-site, by armed VA police with full police-enforcement authority, violates the VA’s enabling statute, 38 U.S.C. §§ 901, 902, and 904.⁵ *Id.* at 11-12. The Agency claims that the VA’s enabling statute precludes VA police from exercising law-enforcement authority off the VA campus. *Id.*

Finally, the Agency contends that the award is based on nonfacts. The Agency argues that the Arbitrator

overlooked pertinent facts when he found that the parties’ agreement and past practices mandate shuttle service and armed police escorts with full police-enforcement authority to off-site parking locations. *Id.* at 16-18.

B. Union’s Opposition.

The Union maintains that the award is not contrary to law or based on nonfacts. Opp’n at 7. However, the Union “does not take issue with the Agency’s analysis of the standards of law that govern the provision of off-site-shuttle service and the off-site authority of VA [p]olice.” *Id.* at 10. But the Union argues that the Authority should uphold the remainder of the award so that the contract’s safe-employee-parking “standard will, in the future, limit the Agency’s ability to provide off-[c]ampus parking to bargaining-unit nurses.” *Id.* at 11. The Union also claims that the Agency’s nonfact exceptions should be rejected. *Id.*

IV. Analysis and Conclusions

The Agency contends that particular provisions of the Arbitrator’s remedy are contrary to law. Specifically, the Agency claims that providing nurses shuttle service to off-site parking, and roving police patrols and escort service off-site by armed VA police with full police enforcement authority, violates various statutes. In response, the Union “does not take issue with the Agency’s analysis of the standards of law that govern the provision of off-site shuttle service and the off-site authority of VA [p]olice.” Opp’n at 10.

Where an opposing party concedes that a remedy is deficient, the Authority modifies the award to set aside the deficient remedy. *See, e.g., U.S. Dep’t of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Tucson, Ariz.*, 66 FLRA 355, 356 (2011) (modifying award to exclude relief to non-affected employees where union conceded that award was deficient); *U.S. Dep’t of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 244 (2011) (finding arbitrator’s granting of thirty days to file petition for attorney fees deficient where union conceded that arbitrator exceeded his authority); *U.S. Dep’t of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 300 (2000) (finding that arbitrator’s award of punitive damages was deficient after union conceded it was contrary to law).

Consistent with this precedent, as the Union concedes that the portion of the remedy directing the Agency to provide off-site shuttle service, roving police

³ The Arbitrator also found that safe employee parking includes matters like adequate lighting and clearing walkways of ice and snow. Award at 12, 14. As the Agency does not except to these aspects of the award, we will not discuss them further.

⁴ As relevant here, 31 U.S.C. § 1344 provides:

(a)(1) Funds available to a Federal agency, by appropriation or otherwise, may be expended by the Federal agency for the maintenance, operation or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes. Notwithstanding any other provision of law, transporting any individual [with exceptions not applicable here] between such individual’s residence and such individual’s place of employment is not transportation for an official purpose.

⁵ The relevant text of 38 U.S.C. §§ 901, 902, and 904 is set forth in the appendix to this decision.

patrols, and escort service is contrary to law, we modify the award to set aside these portions of the remedy.⁶

The Agency also contends that the Arbitrator's alternative remedy is contrary to law. Specifically, the Agency argues that "[t]he Arbitrator's order . . . in the alternative, [to] negotiate over shuttle service to off-site parking, violates federal appropriations law." Exceptions at 11. And the Agency argues that "[b]y ordering the Agency to . . . negotiate or seek waivers over . . . the provision of fully armed police officers on municipal streets and private property, with full law enforcement capacity, . . . the Arbitrator's ruling contradicts" the VA's enabling statute. *Id.* at 12.

The Agency's contrary-to-law exceptions to the Arbitrator's alternative remedy are based on a misunderstanding of the remedy, and are not supported. Contrary to the Agency's claims, the Arbitrator did not order the Agency to negotiate specifically over shuttle service or any of the matters related to the provision of armed VA police with full law enforcement authority off-site. The Arbitrator's remedy merely ordered the Agency to "negotiate new contractual language." Award at 14. The Agency does not explain how such a direction is contrary to law. Similarly, the Agency does not discuss or explain how the Arbitrator's direction to "seek waivers that address federal restrictions presently in place," *id.*, is contrary to law. Accordingly, we find that the Agency's contrary-to-law exceptions to the Arbitrator's alternative remedy provide no basis for finding the award deficient, and deny those exceptions.

V. Decision

We modify the award by setting aside the part of the remedy that directs the Agency to provide off-site shuttle service, and roving police patrols and escort service by armed Agency police with full police enforcement authority, and deny the Agency's remaining exceptions.

APPENDIX

38 U.S.C. § 901 provides, in relevant part:

(a)(1) The Secretary shall prescribe regulations to provide for the maintenance of law and order and the protection of persons and property on Department property.

38 U.S.C. § 902, provides, in relevant part:

(a)(1) Employees of the Department who are Department police officers shall, with respect to acts occurring on department property--
 (A) enforce Federal laws;
 (B) enforce the rules prescribed under section 901 of this title;

(2) Subject to regulations prescribed under subsection (b), a Department police officer may make arrests on Department property for a violation of a Federal law or any rule prescribed under section 901(a) of this title, and on any arrest warrant issued by competent judicial authority.

(b) The Secretary shall prescribe regulations with respect to Department police officers. Such regulations shall include--

(1) policies with respect to the exercise by Department police officers of the enforcement and arrest authorities provided by this section;

38 U.S.C. § 904 provides:

The Secretary shall furnish Department police officers with such weapons and related equipment as the Secretary determines to be necessary and appropriate.

⁶ The Agency's nonfact exceptions challenge the same portions of the remedy that we have set aside based on the Union's concession that they are deficient as contrary to law. *See* Exceptions at 16-18. Therefore, we find it unnecessary to separately address those exceptions. *See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin., Nashua, N.H.*, 65 FLRA 447, 450 n.3 (2011) (finding it unnecessary to address a party's remaining exceptions after setting aside the award as contrary to law).